

# A Renewed Critical Perspective on Social Law: Disentangling Its Ambivalent Relationship With Productivism

Elise DERMINE & Daniel DUMONT\*

*The ecological movement questions the productivist model our societies inherited from the Industrial Revolution. Productivism is based on the belief that the continuous increase in production is possible and desirable. Political ecology and scientists denounce the adverse effects of productivism, in that it produces waste, exhausts natural resources and results in global warming. In this context, this article explores the relationship between social law and productivism. Critical legal scholars classically highlight the function of social law in redistributing the value generated by labour under capitalism. Our aim is to shift the focus and examine the function of social law prior to that, in the definition of what value is, more specifically what kind of labour is considered as creating value and is therefore to be supported. Through the characterization of the forms of work promoted in social law, the article demonstrates the ambivalence of this branch of law towards productivism. It is strongly rooted in the productivist model since it has been constructed around the concept of labour exchanged in the market, considered as the best way to ensure continual growth. However, at the same time, it relativizes productivism by promoting, in some places, economically non-productive but nonetheless (eco) socially useful activities.*

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\* Elise Dermine and Daniel Dumont are respectively professor of labour law and professor of social security law at the Université Libre de Bruxelles (Belgium). This article is based on earlier presentations at the 17th ESPAnet (the European Network for Social Policy Analysis) Conference (Stockholm University, 5 September 2019) and then at the 5th LLRN (Labour Law Research Network) Conference (organized by the Universities of Warsaw and Lodz, 27 Jun. 2021), and the discussions that had followed with the other panelists. The authors thank the two anonymous reviewers, whose requests for further clarifications helped to improve the first draft of the article and to better situate it within the literature. Emails: elise.dermine@ulb.be, daniel.dumont@ulb.be.

“One of the greatest merits of the critical legal studies movement was to have created an intellectual space in which law and legal thought could be better used to resist the dictatorship of no alternatives. Its limited but important contribution to such resistance was the development of ideas about alternatives, made from the contradictions and variations in established law.” Roberto M. Unger, *The Critical Legal Studies Movement. Another Time, a Greater Task* 15 (Verso 2015)

## 1 INTRODUCTION

The conclusions of the latest Intergovernmental Panel on Climate Change (IPCC) report on climate science in 2021 were unequivocal.<sup>1</sup> Human activity has been warming the climate since 1850 at a rate that is unprecedented in at least the last 2000 years. It has large-scale repercussions in all regions of the world and on the different components of the climate system (atmosphere, oceans, cryosphere and biosphere). It gives rise to extreme climatic phenomena (heat waves, floods, drought). Unless our societies drastically limit greenhouse gas emissions over the next few decades, global heating will continue to increase and reach 1.5 or even 2° C by the end of the twenty-first century.

Still in 2021, a few months later, the twenty-sixth United Nations Climate Change Conference (COP26) gave birth to a mouse. Surely this was due to the difficulty of reaching agreement in a multilateral international process. More generally we cannot help but notice that, despite the accumulating scientific evidence, governments, businesses and individuals are very slow to turn the imperative of ecological transformation of our societies into concrete action. Explaining this contradiction between knowledge and action, philosopher Serge Audier has recently shown that it is not enough to blame capitalism and its short-term logic of profit, even though these factors clearly are part of the explanation. The contradiction is more widely linked, he argues, to the productivist ideology shared by liberals as well as by socialists since the beginning of the industrialization of our societies.<sup>2</sup>

What is ‘productivism’? The concept has not yet been defined in a stable way.<sup>3</sup> It was first disseminated at the end of the nineteenth century through the writings of Ernest Solvay, a Belgian industrialist and well-known figure of social liberalism. According to Solvay, ‘(t)o create and to multiply productive capacities at all levels, so must be the primary goal of the whole social policy’.<sup>4</sup> Inherited from the industrial era, productivism is thus characterized by ‘the unlimited quest for maximum production’.<sup>5</sup> The productivist model was endorsed both by

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<sup>1</sup> Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2021).

<sup>2</sup> Serge Audier, *L'âge productiviste. Hégémonie prométhéenne, brèches et alternatives écologiques* (La Découverte 2019).

<sup>3</sup> On this notion, see e.g., Tony Fitzpatrick, *A Post-Productivist Future for Social Democracy?*, 3 Soc. Pol’y 214 (2004); Karen R. Foster Buffalo, *Productivity and Prosperity: A Historical Sociology of Productivist Thought* (University of Toronto Press 2016); Michael Rogan & Laura Alfers, *Employment-based Social Protection: ‘Productivism’, Universalism and Social Citizenship*, in *Handbook of Social Policy and Development* 265 (James Midgley, Rebecca Surender & Laura Alfers eds, Edward Elgar 2019).

<sup>4</sup> Ernest Solvay, *Principes d’orientation sociale. Résumé des études de M. Ernest Solvay sur le productivisme et le comptabilisme* 37 (Misch & Thron 1904) (our translation).

<sup>5</sup> Audier, *supra* n. 2, at 91.

Western nations that embraced capitalism and by communist countries.<sup>6</sup> The continuous increase of production was not initially an end in itself: it was pursued as it contained the promise of improving the general well-being of the population. In this sense, according to Solvay, 'being productivist means recognizing that the true way to ensure the well-being of human beings is to develop, by all means, the production of material or immaterial goods that they desire and will desire more and more'.<sup>7</sup> It is for this reason of general interest that society must henceforth be entirely geared towards the objective of economic growth. However, very quickly, productivism has become hegemonic,<sup>8</sup> in the sense that the assumption on which it is based, that is, the link between its goal, i.e., the increase of the population's well-being, and the means it focuses on, i.e., the continuous increase of production, has come to be unquestioned. The key point is that despite the considerable evolution of scientific knowledge that used to undermine it over the course of the twentieth century, this assumption currently continues to guide the behaviour of many individuals and public authorities.<sup>9</sup> On the basis of these different considerations, we propose to retain the following definition of productivism: inherited from the Industrial Revolution, productivism is the ideology based on the belief that continually increasing production in a society is both possible and desirable, and that economic growth should be the central objective of all human organization.

In this article, we propose to explore the relationship between social law and productivism. Under the label 'social law' we include both labour law in the broad sense (collective and individual labour law, or employment law) and social security law. We therefore follow the Franco-German tradition by which these two subject areas are considered to form a coherent and independent whole. They should be understood in concert because they were constructed in a single movement so as to respond in a complementary way to issues of social justice.<sup>10</sup> In characterizing the

<sup>6</sup> *Ibid.*, at 91.

<sup>7</sup> Solvay, *supra* n. 4, at 33 (our translation).

<sup>8</sup> On the notion of cultural hegemony developed by Antonio Gramsci, in his *Prison Notebooks*, to characterize the relationship between power and culture under capitalism, see T. J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, *Am. Hist. Rev.* 567 (1985).

<sup>9</sup> Audier, *supra* n. 2, at 91. See also the pioneering work of Pierre Kende, who was an expert on the economies of the communist countries of Eastern Europe, on productivism as an intention and a state of mind: *L'abondance est-elle possible ?* (Gallimard 1971).

<sup>10</sup> In this we are answering the call from Manfred Weiss. He observed that it is all too often overlooked that labour law and social security law are two sides of the same coin and thus exhorted researchers to cover both branches and their interactions in their studies. In this regard he noted that Hugo Sinzheimer, the German jurist and author of the Weimar Constitution (1919), did not distinguish social law (*soziales Recht*) from labour law (*Arbeitsrecht*): 'Sinzheimer stressed that labour law cannot be perceived as merely law for the employment relationship but has to cover all the needs and risks which have to be met in an employee's life, including the law on creation of job opportunities. In other words: Sinzheimer understood social security law in its broadest sense as also being an inseparable part of labour law' (Manfred Weiss, *Re-Inventing Labour Law?*, in *The Idea of Labour Law* 44 (Guy Davidov

relationship between social law and productivism, we examine the different types and forms of work that are promoted in international social law, on the one hand, and in national systems of social law in countries with market economies, on the other.<sup>11</sup> At the international level, we focus our study on the first of the fundamental social rights enshrined in the post-war international covenants, the right to work, at the level of the United Nations and the Council of Europe, as well as on the various instruments of the International Labour Organization aimed at concretizing this fundamental right. The study of international social law provides a useful complement to the study of national systems of social law in market economies, as it sheds light on the worldviews shared, at the time, by both the Western bloc countries (with market economies) and the Eastern bloc countries (with planned economies). Social law at the national level comes next. Both international and national corpora are put in perspective by sallies into the history of ideas so as to reveal the material sources of the norms discussed. By examining this dual set of legal materials (international and national), we examine whether social law concerns and protects productive labour alone, or whether it also supports the development of other types of economically non-productive but (eco)socially useful activities.

The article is constructed in two parts, preceded by a preliminary section aimed at clarifying the approach and the focus of the study. In this preliminary section, we place our contribution within the movement of critical legal studies. While critical legal scholars have classically highlighted the function of social law in redistributing the value generated by labour under the capitalist system, our aim here is to shift the focus and examine the function of social law prior to that, in the definition of what value is, or more specifically what kind of labour is considered as creating value and is therefore to be supported. The article thus aims to unravel the relationship of social law not with capitalism, but with productivism (2.). This

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& Brian Langille eds, Oxford University Press 2011)). In the same vein see Ruth Dukes, *The Labour Constitution. The Enduring Idea of Labour Law* 15 (Oxford University Press 2014). On the autonomy of social law, see also Léon Duguit, *Le droit social, le droit individuel et la transformation de l'Etat* (Alcan 1908); Georges Gurvitch, *The Problem of Social Law*, 52 *Ethics* 17 (1941); Gunther Teubner, *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (de Gruyter 1987).

<sup>11</sup> In contrast, we have excluded the social law of the European Union from the scope of the study. Indeed we have chosen to work on decoding the social sources and principles at the root of the creation and development of social law during the industrial period. In this perspective, it is more relevant to study social law at the international and national levels, which were constructed well before European social law. On the fact that European economic integration was built on elaborated national systems of social law, see Diamond Ashiagbor, *Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration*, 19 *Eur. L. J.* 303 (2013). The normative blueprint outlining EU soft law in the social domain (then the Lisbon Strategy 2000–2010) has been depicted as the promotion of paid employment for all adults, including women, older workers and people with disabilities, in order to secure their economic independence: Claire Annesly, *Lisbon and Social Europe: Towards a European 'Adult Worker Model' Welfare System*, *Eur. J. Soc. Pol'y* 195 (2007).

research programme is then realized in two stages. The second part shows that social law is firmly rooted in the productivist model. It has been constructed around labour exchanged in the market, considered as the best way to ensure continual increase in the production of wealth (3.). The third part then highlights that social law nevertheless carries within it the seeds to relativize productivist logic. In some places and at what is admittedly still an embryonic stage, it promotes activities that are economically non-productive (4.). The relationship of social law with productivism, and this will be our thesis, thus comes across as being deeply ambivalent, in that it underpins it and contains it at one and the same time. In conclusion, the article prompts reflection on the possibility of progressively emancipating social law from the productivist model, with a view to social and ecological transition, via a strategy of extending existing mechanisms that promote ecosocially useful activities not recognized by the market (5.).

## 2 THE CRITICAL STUDY OF SOCIAL LAW: MOVING FORWARD FROM CAPITALISM TO PRODUCTIVISM

At the end of the 1970s and during the 1980s a critical approach to legal thought developed within the Western world, concomitantly on both sides of the Atlantic: the Critical Legal Studies movement in the United States<sup>12</sup> and the *Mouvement critique du droit* in France.<sup>13</sup> Even if the two movements had their own doctrinal roots and specificities<sup>14</sup> and had apparently limited interaction,<sup>15</sup> they shared two

<sup>12</sup> On the Critical Legal Studies movement in the United States, see Duncan Kennedy, *The Rise & Fall of Classical Legal Thought*, with a new preface by the author, 'Thirty years later' (BeardBooks 2006); Roberto M. Unger, *The Critical Legal Studies Movement. Another Time, a Greater Task* (Verso 2015). The Critical Legal Studies movement then spread to other countries such as the United Kingdom, Australia and South-Africa. For a family tree of the Critical Legal Studies movement, see Costas Douzinas & Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* 229–258 (Hart 2005) and James Gilchrist Stewart, *Demystifying CLS: A Critical Legal Studies Family Tree*, 41 *Adel. L. Rev.* 121 (2020).

<sup>13</sup> On the *Mouvement critique du droit* in France, see Claude Journès, *Retour sur le mouvement critique du droit*, in *Le droit figure du politique: études offertes au Professeur Michel Miaille* 95 (Jean-Louis Autin, Laurence Weil, Laurence & André Castagné eds, Université de Montpellier 2008); *Le droit en révolution(s). Regards sur la critique du droit des années 1970 à nos jours* (Xavier Dupré de Boulois & Martine Kaluszynski eds, L.G.D.J. 2011); and in English: Martine Kaluszynski, *The Changing Face of Law After the Events of 1968 ... Or When Law Meets Politics: Introduction to the Mouvement Critique du Droit*, 2 *Oñati Socio-Legal Series Critical Thinking Inside Law Schools* 25 (2012).

<sup>14</sup> While the *Mouvement critique du droit* in France was a movement firmly anchored in Marxism that developed materialist analyses of law, the critical legal studies movement is much more heteroclitic and its authors are classically divided into three factions: the Marxists, the deconstructivists and the institutionalists (Unger, *supra* n. 12, at 26–32). It should also be noted that American critical authors have been more concerned with studying the legal doctrine and identifying its contradictions and inconsistencies, rather than conducting themselves an immediate critique of the law, unlike European authors (on this major difference, see Mauricio García-Villegas, *Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States*, 31(2) *L. & Soc. Inquiry* 343, 372–373 (2006).

<sup>15</sup> Kaluszynski, *supra* n. 13, at 31.

main objectives. First, in opposition to the positivist tradition, critical legal scholars recognized the links between law and politics and aimed at exposing the world views encoded in law, or in other words, the ideological dimension of law.<sup>16</sup> They highlighted the indeterminacy of law. Through a wide range of socio-historical studies in various areas of law, they showed that legal material contains internal contradictions that result from the variety of social sources that underpin it. Therefore legal rules are susceptible to varied legal interpretations and do not determine legal outcomes.<sup>17</sup> Second, critical legal scholars aimed to contribute to social change. By uncovering the contradictions and inconsistencies of our dominant legal concepts, they hoped ‘to free us from the illusion of the necessity of existing social arrangements’.<sup>18</sup> They shared the will, through their critical analysis of legal material, to resist the dictatorship of no alternatives and to open up the possibility of imagining new social arrangements.<sup>19</sup> The approach at the heart of critical analysis is thus, as Trubek summarizes it, ‘to bring to “consciousness” what is hidden by hegemonic world views’.<sup>20</sup>

<sup>16</sup> David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *Stan. L. Rev.* 575, 589–591 (1984); Karl Klare, *Critical Theory and Labor Relations Law*, in *The Politics of Law: A Progressive Critique* 76 (David Kairys ed., New York Pantheon Books 1982); Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 *L. & Soc’y Rev.* 11 (1985); Kaluszynski, *supra* n. 13, at 31.

<sup>17</sup> See e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685 (1976); Duncan Kennedy, *Legal Formality*, 2 *J. Legal Stud.* 351 (1973); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L. J.* 997 (1984).

<sup>18</sup> According to the phrasing of Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *Indus. Rel. L. J.* 450, 482 (1981). Most of the critical authors limited themselves to an analytical work of highlighting and denouncing the ideological character of the law, without developing a prescriptive vision of desirable transformations, but some pushed further into the propositional side. Some critical legal scholars reflected on the elaboration of a mode of governance which would be responsive to the prescriptive implications of critical legal scholarship. See e.g., William H. Simon on Trubek’s work: *Critical Theory and Institutional Design: David Trubek’s Path to New Governance*, in *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* 15 (Grainne de Búrca, Claire Kilpatrick & Joan Scott eds, Hart Publishing 2014). Roberto M. Unger is also one of these authors. He thought that ‘legal thought can become a practice of institutional imagination’ (*supra* n. 12, at 29). Others, essentially French, had a precise prescriptive vision of the desirable model of society to replace capitalism: according to them, the critique of the law had to have as a perspective the transition to socialism. As an example, Michel Miaille wrote in his seminal work *Une introduction critique au droit* 132 (Maspero 1976) that ‘the purpose of the Movement is to transform teaching and research practices in law faculties and thus contribute to a different understanding of law within the perspective of a transition towards socialism’ (following the translation proposed by Martine Kaluszynski).

<sup>19</sup> On the transformative function of critical legal studies, see Trubek, *supra* n. 16; Roberto M. Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561 (1983). On the French side, see e.g., *Crise et droit. Droits et crise*, *Procès* 6 (1980), in which the authors of the French critical movement indicate that they want to ‘work on the presuppositions of the political-legal, to deepen the theoretical lines of research, to open a wide debate on the law in the social formations and to forge the concepts without which there could not be understanding and transformation of our societies’ (our translation); see also Martine Kaluszynski, *Sous les pavés, le droit: le Mouvement critique du droit ou quand le droit retrouve la politique*, 3(76) *Droit et Société* 523, 532–533 (2010).

<sup>20</sup> Trubek, *supra* n. 16.

Nevertheless it may be observed that the various analyses carried out on both sides of the Atlantic during the 1980s focused as a matter of fact on one specific objective: deconstructing and criticizing the law of the capitalist society. Capitalism was understood – as we still understand it nowadays – to be the system of production characterized by the private ownership of the means of production and their deployment by workers who do not own them. The *Mouvement critique du droit* in France was in this way entirely articulated around the following hypothesis stated in its 1978 manifesto: ‘the state of law is a set of phenomena resulting from class warfare, characterized by social contradictions in such a way that a supposedly neutral analysis of law simply serves to reinforce the domination of the *capitalist* production pattern through idealism and bourgeois formalism’.<sup>21</sup> As Trubek notes, the focus was identical among American authors: ‘the Critical scholars’ main concern is with the interpretation of legal consciousness of *capitalist* societies, to the end of social transformation’.<sup>22</sup> Thus, the studies carried out during these two decades consisted in highlighting that the different substantive areas of law and the main legal concepts participate in the institution, functioning and reproduction of the capitalist system.

Among these works, an important subset referred to labour law,<sup>23</sup> suggesting that the relationship between labour law and capitalism is an ambivalent one.<sup>24</sup>

<sup>21</sup> Maurice Bourjot, Philippe Dujardin, Jean-Jaques Gleizal, Antoine Jeammaud, Michel Jeantin, Michel Miaille & Jacques Michel, *Pour une critique du Droit* (Presses universitaires de Grenoble et Maspero 1978). We follow the translation proposed by Kaluszynski *supra* n. 13, at 33. See also Miaille, *supra* n. 18, at 133, more particularly the part II entitled « L’art juridique et les contradictions sociales (dans un mode de production capitaliste) » (19–276).

<sup>22</sup> Trubek, *supra* n. 16. However, an important difference, as explained above in footnote 18, is that the scholarship on that side of the Atlantic was mainly not developing a Marxist critique of capitalism, but rather a deconstructionist one. See also Rob Hunter, *Critical Legal Studies and Marx’s Critique: A Reappraisal*, 31 *Yale J. L. & Human.* 389 (2021); Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 *Transnat’l Legal Theory* 622 (2014).

<sup>23</sup> For an overview of critical labour law scholarship, see Ruth Dukes, *Critical Labour Law: Then and Now*, in *Research Handbook on Critical Legal Theory* 345 (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds, Edward Elgar 2019).

<sup>24</sup> See e.g., after the pioneering article by Gérard Lyon-Caen in the journal *Droit ouvrier*, *Les fondements historiques et rationnels du droit du travail*, *Droit ouvrier* 1–5 (1951), the contributions from French labour lawyers in the Marxist tradition: Bernard Edelman, *La légalisation de la classe ouvrière* (Christian Bourgeois 1978); Antoine Jeammaud, *Droit du travail et/ou droit du capital*, 2 *Procès. Revue d’analyse politique et juridique* 15–116 (1978); Antoine Jeammaud, *Propositions pour une compréhension matérialiste du droit du travail*, *Droit social* 337–345 (1978); Francis Collin, Régine Dhoquois, Pierre-Hubert Goutier, Antoine Jeammaud, Gérard Lyon-Caen & Albert Roudil, *Le droit capitaliste du travail* (Presses Universitaires de Grenoble 1980); Yannick Guin, *Epistémologie de l’histoire du droit du travail*, 13 *Procès* 10–40 (1983). For a demonstration, in the same period, by American labour law scholars of the ambivalent and contradictory role of labour law, in particular collective bargaining law, in capitalist societies, see Klare, *supra* n. 16 and 18; from the same author, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *Indus. Rel. L. J.* (1981); Katherine Stone, *The PostWar Paradigm in American Labor Law*, 90 *Yale L. J.* 1509 (1981); Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 *Indus. Rel. L. J.* 503 (1981); James B. Atleson, *Values and Assumptions in American Labor Law* (University of Massachusetts Press 1983).

Clearly, the purpose of labour law is to limit capitalist exploitation by providing a protective status for the workers and by modifying the way the profits generated by their labour are distributed. However, at the same time, critical labour law scholars demonstrated that this branch of law also plays a key role in validating and maintaining capitalist exploitation by making wage labour acceptable and promoting its development. In a market economy, 'free' workers have no other choice than to hire out their labour in exchange for wages to the owners of the means of production who, through the efforts of this labour force, see their capital bear fruit. While these studies focused on labour law, Simon Deakin later highlighted, regarding this time social security law, that 'the mechanisms through which social insurance mitigated the risks inherent in labour market participation simultaneously normalized the practice of waged labour'.<sup>25</sup>

In this contribution, we will not engage in the academic debate that has opened up over the past decade on whether or not the critical law movement is dead or dormant and what the explanatory factors might be.<sup>26</sup> Instead, we just want to point to the specific context that was fertile ground for the development of critical legal studies in the 1970s, namely that the movement of critical legal scholars emerged at a time when the consensus around capitalism was becoming vulnerable in the Western bloc in the 1970s. As explained by Unger, '(t)he critical legal studies movement seized the opportunity to disrupt a consensus that had already begun to weaken'.<sup>27</sup> Critical legal scholars have worked to highlight the different aspects of the law serving the capitalist ideology. In addition, they have also carried out a systematic work of identifying, alongside the dominant capitalist structures present in the law, the deviant solutions, the anomalies or exceptions in each branch of the law, and this in a perspective of radical or progressive transformation of society.<sup>28</sup>

Today, on the basis of empirical evidence of environmental degradation and its socio-economic consequences, it is the scientific and social consensus around productivism that is beginning to crumble.<sup>29</sup> The younger generation are taking an active role in shaking up the consensus. Consider, for example, the international movement of student climate strikes launched in 2018, although it has been

<sup>25</sup> Simon Deakin, *The Contribution of Labour Law to Economic and Human Development*, in *The Idea of Labour Law* 165 (Guy Davidov & Brian Langille eds, Oxford University Press 2011).

<sup>26</sup> James Gilchrist Stewart, *CLS Is Haunted! A Perspective on Contemporary Critical Legal Studies*, 32 L. & Lit. 135 (2020); see also Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & Contemp. Probs 71 (2014); Kaluszynski, *supra* n. 13, at 40–42.

<sup>27</sup> Unger, *supra* n. 12, at 21.

<sup>28</sup> *Ibid.*, at 19–24.

<sup>29</sup> Tim Jackson, *Prosperity Without Growth: Economics for a Finite Planet* (Earthscan 2011); from the same author, *Prosperity Without Growth: Foundations for the Economy of Tomorrow* (Routledge 2017); Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 Sci. 6223 (2015).



somewhat sidelined by the coronavirus pandemic. We therefore believe that there is currently a crucial momentum for a revival of the critical movement in law. As noted in the introduction, it is essential to engage in a critique, not only of capitalism, but also of the hegemony of productivism to get to the root of the troubles. This research agenda has begun to be carried out in a number of studies that offer a panoramic survey of the intellectual history of this notion.<sup>30</sup> Legal scholars must take part in these works and take up critical lenses to unravel the relations between law and productivism, and show how the structures of law support productivism and/or offer tools to question it.<sup>31</sup> As productivism appears to be a shared worldview of our modern societies, it is essential that these renewed critical studies move this time beyond national perspectives.<sup>32</sup>

Regarding social law, this implies a displacement of the focus of the critical analysis. It is no longer about examining the function of social law in the redistribution of the value generated by labour in the capitalist system. The critical scrutiny shifts upstream, to the function of social law in the identification of the type of labour that is considered to create value. In this respect, we underline the pioneering work of feminist legal scholarship, which highlighted that social law promotes paid work, which supposedly produces value, and at the same time disregards unpaid care work in the domestic sphere, which is generally carried out by women, despite its value for the community.<sup>33</sup> Building on this groundwork, a few labour lawyers have recently undertaken to nurture an ecological critique of labour law.<sup>34</sup> Among them, some specifically address the issue of the relationship between labour law and the search for productivity. They denounce the idea that labour law should only be interested in market-based work aimed at economic productivity, regardless of its social-ecological value, and extend an invitation to rethink employment regulation to be more sensitive to social-ecological concerns.<sup>35</sup> In this contribution, we respond to their call to ‘start a

<sup>30</sup> Foster, *supra* n. 3; Audier, *supra* n. 2, at 91.

<sup>31</sup> For a pioneering essay on the subject, see Fernand Tanghe’s outstanding piece: *Le droit au travail entre histoire et utopie. 1789–1848–1989: de la répression de la mendicité à l’allocation universelle* (Publications des Facultés universitaires Saint-Louis Bruxelles 1989).

<sup>32</sup> On the need for critical studies at a transnational level, see Unger, *supra* n. 12, at 4; Kaluszynski, *supra* n. 13, at 42 and Michel Miaille, *Critique du droit, 30 ans après*, texte d’une intervention orale, mai 2006 as referred to in Kaluszynski, *supra* n. 13, at 42.

<sup>33</sup> See e.g., Joanne Conaghan, *Work, Family and the Discipline of Labour Law*, in *Labour Law, Work, and Family. Critical and Comparative Perspectives* 19 (Joanne Conaghan & Kerry Rittich eds, Oxford University Press 2005); Judy Fudge, *Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction*, 22 *Feminist Legal Stud.* 1 (2014).

<sup>34</sup> See the special issue, consisting of six contributions, examining the relationship between work regulation and environmental sustainability: Ana Zbyszewska ed., 40 *Comp. Lab. L. & Pol’y J.* 1 (2018).

<sup>35</sup> Supriya Routh, *Embedding Work in Nature: the Anthropocene and Legal Imagination of Work as Human Activity*, 40 *Comp. Lab. L. & Pol’y J.* 29 (2018); Ania Zbyszewska, *Regulating Work With People and ‘Nature’ in Mind: Feminist Reflections*, 40 *Comp. Lab. L. & Pol’y J.* 9 (2018). See also by the same

conversation’,<sup>36</sup> by proposing to further explore the relationship between productivism and social law, as a whole, including not only labour law but also social security law.<sup>37</sup> In the tradition of critical legal scholars, we seek to highlight that social law is more indeterminate than it first appears, because it is driven by contradictory logics. Certainly, it supports and reinforces the productivist model. However, at the same time, since it tends to promote individual autonomy, it contains, at the margins, resources for relativizing, and even challenging, the productivist imperative.

### 3 SOCIAL LAW AND THE PRODUCTIVIST MODEL: VALUING LABOUR AS A COMMODITY

In this section we argue that social law is ultimately underpinned, historically, by the model of productivism. Its protective purpose notwithstanding, social law is a tool that serves the end pursued by this model, namely to continually increase production within society. In other words, it is an integral part of the legal infrastructure of the productivist model.

This filiation can easily be established for international social law, which explicitly promotes ‘full productive employment’. It is less immediately obvious for national systems of social law because productive labour is not as such a feature of them. But by establishing a legal framework for ‘wage labour’, social law legitimizes labour as a commodity that is exchanged against payment in the marketplace. And, in Western liberal economies, it is this type of labour that is seen as the prime vector for increasing production and creating wealth.

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authors: Ania Zbyszewska & Supriya Routh, *Challenging Labour Law’s Productivist Focus: Insights from Research on Informal and Unpaid Work*, in *Theorizing Labour Law in a Changing World: Towards Inclusive Labour Law* 245 (Alysia Blackham, Miriam Kullmann & Ania Zbyszewska eds, Hart 2019).

<sup>36</sup> See the introduction to the special issue on the relationship between labour law and environmental sustainability of the *Comparative Labor Law & Policy Journal* in 2018: Ania Zbyszewska, *Labor Law For a Warming World? Exploring the Intersections of Work Regulation and Environmental Sustainability: An Introduction*, 40 *Comp. Lab. L. & Pol’y J.* 7 (2018).

<sup>37</sup> Beyond the field of legal research, and with regard to national social security systems, it should also be noted that some researchers in social policy are reworking the classification of welfare state regimes to include the productivist/post-productivist dimension, or undertaking reflections on the elaboration of a new model of eco-social welfare: Robert E. Goodin, *Work and Welfare: Towards a Post-Productivist Welfare Regime*, 31 *Brit. J. Pol. Sci.* 13–39 (2001); Tony Fitzpatrick, *After the New Social Democracy: Social Welfare for the 21st Century*, Chapter 5: Productivism and Beyond and Chapter 6: A Model of Ecowelfare 97 (Manchester University Press 2003); Martin Fritz & Max Koch, *Public Support for Sustainable Welfare Compared: Links Between Attitudes Towards Climate and Welfare Policies*, 11 *Sustainability* 4146 (2019); Tuuli Hirvilammi & Max Koch, *Sustainable Welfare Beyond Growth*, 12 *Sustainability* 1824 (2020); Max Koch, *Social Policy Without Growth: Moving Towards Sustainable Welfare States*, *Soc. Pol’y & Soc’y* 1 (2021); Tony Fitzpatrick, *Paradigm Lost? Blocking the Path to Ecosocial Welfare and Post-Productivism*, in *The Struggle for Social Sustainability. Moral Conflicts in Global Social Policy* 109–128 (Christopher Deeming ed., Policy Press 2021).

### 3.1 INTERNATIONAL SOCIAL LAW AND THE ELEVATION OF PRODUCTIVE LABOUR TO THE RANK OF A HUMAN RIGHT

Internationally, the consecration of fundamental social rights in the course of the twentieth century is marked by the productivist frame of reference. The ‘right to work’ is probably the most emblematic instance of this.<sup>38</sup>

The enshrinement of the right to work in the post-war international covenants was fiercely debated between the Western and Eastern blocs as regards the legal nature of the right (negative or positive right) and the scope of the ensuing obligations for the authorities (obligations to protect or obligations to fulfill, obligations to use best efforts or to achieve certain outcomes). Conversely, there was not the least discussion about the subject matter of the right. Against a shared productivist ideological background, it was understood, not to say self-evident, that the right to work should concern productive work only, meaning work that contributes to economic growth. After all, it was believed, it is on such work that the increased living standards of individuals and the improved well-being of society as a whole depended.

Thus, Article 6 of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), which enshrines the right to work, explicitly provides that the steps states shall take to achieve this right are to aim at full and ‘productive’ employment. No such clarification can be found in Article 1 of the Council of Europe’s European Social Charter (ESC) on the right to work. However, the preamble to the Charter provides that, generally, the various social rights it enshrines are intended to raise living standards and the general well-being. The preparatory works provide a glimpse of the spirit behind this wording: before it was shortened, the initial version of the preamble specified that raising living standards depends on economic conditions and more specifically on the development of production.<sup>39</sup> In the way they have been enshrined in law, the right to work and fundamental social rights more generally thus seem to have been profoundly marked by productivist logic.

A similar observation can be made when it comes to international social law. Although the primary theme of the normative work of the International Labour

<sup>38</sup> For a detailed examination of the *travaux préparatoires* and the wording of the various provisions that enshrine the right to work in the post-World War II international conventions, see Elise Dermine, *Droit au travail et politiques d’activation des personnes sans emploi. Etude critique du rôle du droit international des droits humains* 105–136 (Bruylant 2016) and the many references. In English, by the same author, see *The Right to Work: A Justification for Welfare-to-Work?*, in *Welfare to Work in Contemporary European Welfare States: Legal, Sociological and Philosophical Perspectives on Justice and Domination* 49 (Anja Eleveld et al. eds, Policy Press 2020). On the right to work, see also *The Right to Work. Legal and Philosophical Perspectives* (Virginia Mantouvalou ed., Hart 2015).

<sup>39</sup> Council of Europe, *Charte sociale européenne: recueil des travaux préparatoires*, Strasbourg, vol. II (1955), at 13, <https://rm.coe.int/16806c1be6>.

Organization (ILO) is the decommodification of labour and the humanization of work, it is also permeated by the growth paradigm. Clearly, the 1944 Philadelphia Declaration underpinning the actions of the ILO affirms that labour is not a commodity and that the organization of the economy should be subject to the pursuit of social justice.<sup>40</sup> But at the same time it endorses and propagates the narrative that the pursuit of social justice ‘necessarily’ involves ‘the fuller and broader utilization of the world’s productive resources’ and ‘measures to expand production and consumption’ (Article IV). In the same vein the Employment Policy Convention, 1964 (No. 122) can be referred to. It was designed to give substance to the right to work and commits States Parties to pursue ‘an active policy designed to promote full, productive and freely chosen employment’, especially ‘[w]ith a view to stimulating economic growth and development’ and ‘raising levels of living’ (Article 1, §1). On the international stage in the 1980s, despite the devaluation of Keynesian policies in the West and the collapse of communism in the East, productive work did not vanish from the ILO language. For example, the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) lays down that each State Party:

shall seek to ensure that its system of protection against unemployment, and in particular the methods of providing unemployment benefit, contribute to the promotion of full, productive and freely chosen employment, and are not such as to discourage employers from offering and workers from seeking productive employment (Article 2).<sup>41</sup>

Admittedly, the ILO has refocused its action, since 1999, on the promotion of ‘decent work’, but the first component of decent work remains ‘to get access to productive remunerative jobs’.<sup>42</sup> Moreover, full and productive employment and a high level of economic productivity count among the main objectives of the United Nations Development Programme (UNDP) for 2030.<sup>43</sup>

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<sup>40</sup> For an analysis, see Alain Supiot, *The Spirit of Philadelphia: Social Justice v. the Total Market* (Verso 2012).

<sup>41</sup> The link between productive employment and national unemployment benefit systems is also established in the case law of the European Committee of Social Rights (ECSR), responsible for monitoring the application of the ESC by the Member States, concerning the right to work: since 2002, this Committee assesses the conformity of policies pursued by the States with regard to the right to work on the basis of a set of indicators, among which the most important are the level of expenditure in active labour market policies and the activation rate of the unemployed. See ESCR, Conclusions 2002 on the application of the 1996 revised ESC, Statement of Interpretation of Art. 1, §1, 31 Mar. 2002; E.C.S.R., Conclusions 2012 on the application of Art. 1, §1, of the 1996 revised ESC, Albania, Bosnia and Herzegovina and Russia, 7 Dec. 2012. On this case law, see Elise Dermine, *Social Rights Adjudication and the Future of the Welfare State*, in *Research Handbook on International Law and Social Rights* 348–354 (Christina Binder, Jane A. Hofbauer, Flávia Piovesan & Amaya Úbeda de Torres eds, Edward Elgar 2020).

<sup>42</sup> ILO, *Decent Work*, Report of the Director General to the International Labour Conference, 87th session, Geneva, 1999.

<sup>43</sup> See the UNDP website, [www.undp.org/content/undp/en/home/sustainable-development-goals/goal-8-decent-work-and-economic-growth.html](http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-8-decent-work-and-economic-growth.html) (accessed 28 May 2021).

It can thus be seen how far international social law, like the international law of fundamental rights, fits in with the productivist rationale. A brief genealogy of the model sheds light on this observation. The productivist model is rooted in the economic liberalism that emerged, like political liberalism, in eighteenth-century Europe. Both are based on the assertion of individual autonomy and simultaneous opposition to any form of domination. To achieve this common aspiration, the founders of political liberalism proposed to consecrate subjective rights for the benefit of individuals and to safeguard pluralism of values. Economic liberalism nurtured a utopian vision of the advent of a market society. The historian Pierre Rosanvallon points out in *Utopian Capitalism* that for the early market theorists, and especially Adam Smith, the founder of modern political economy, the market is not just a technical instrument for organizing economic activity: it takes on more fundamentally a social and political meaning. Rosanvallon argues that economic liberalism projects an ideal of a society that regulates itself 'immanently', that is, without any heteronomous intervention from some overarching power, through market exchanges.<sup>44</sup> Social cohesion in this society is supposedly based both on the interdependence of individuals in the context of exchanges and on the satisfaction of the needs of all via the market. Economic liberalism thus depends on an anthropology of needs. Scarcity is considered as the cause of social division, and the satisfaction of needs should alone suffice to deal with conflicts and ensure social harmony.<sup>45</sup>

It is as part of the blueprint for this ideal society that labour, in fact confined to productive labour, came to acquire a central position and a homogeneous meaning. This intellectual shift can be observed in Smith's writings and more especially in *An Inquiry into the Nature and Causes of the Wealth of Nations* published in 1776.<sup>46</sup> Human labour was subsequently considered the force that enabled value to be created. It is the concrete factor behind greater wealth. It was theorized as the instrument for objectively measuring the economic value of a good or a service as a function of the amount of labour required to produce it (the theory of labour value). It also served as a means of measuring goods and services, allowing them to be traded in the market. Just as all the virtues were attributed to the market, economic functions assigned to work were extended by social functions. Work was recast as the mainstay of social cohesion and peace. In this respect, Smith highlighted the centrality of the division of labour: because individuals perform specialized tasks in order to be more productive, they are dependent on the work

<sup>44</sup> Pierre Rosanvallon, *Le capitalisme utopique. Histoire de l'idée de marché* (Seuil 1979).

<sup>45</sup> Jean Baudrillard, *The Mirror of Production* (Telos Press 1975, originally published as *Le miroir de la production* in 1973).

<sup>46</sup> Rosanvallon, *supra* n. 44, at 70–77. See also the major study by Dominique Méda on the history of the concept of work: *Le travail, une valeur en voie de disparition* 60–73 (Flammarion 1995).

of others for their own consumption and the satisfaction of their own needs. Work was associated with the promise of pacification of relations through the increase in wealth that was meant to lead to abundance. In other words, 'better' came to be thought of exclusively as 'more', and productive work was the prime medium for this change.

Authors like Rosanvallon have shown that liberal utopia forms the ultimate horizon of modernity.<sup>47</sup> When, in the nineteenth century, the first socialists criticized the property-owning classes for grabbing the wealth produced by labour, they nevertheless shared the view of the world conveyed by liberal utopia. It was even in its name that, in some sense, they criticized the development of bourgeois capitalism. They, too, sought to bring forth a harmonious self-regulated society, and to achieve this, they adhered to the productivist logic that was supposed to produce abundance: abundance, the socialists believed, would transform society and free it from alienating work.<sup>48</sup> Much later, some were to argue that abundance is actually a horizon that can never be reached in modern productivist societies. These societies operate on the principle of an infinite development of needs and therefore an everlasting feeling of scarcity, which is actually socially constructed.<sup>49</sup>

In any event, the central point here is that by promoting productive work, international social law fits in with a two-century old history of representations. This history confers a major role in the pacification of the societies we live in on increased production. In the liberal utopia, work is a leading duty of individuals towards society, in that economic prosperity, like social cohesion, depends on the participation of everyone in the production of wealth.

### 3.2 NATIONAL SYSTEMS OF SOCIAL LAW AND THE VALIDATION OF THE MARKET AS THE ADJUDICATOR OF WEALTH CREATION

In market economies, national systems of social law do not contain any explicit reference to 'productive work'. The human labour that they do enfold within a

<sup>47</sup> Rosanvallon, *supra* n. 44, at 179–207 and 222–226.

<sup>48</sup> In this sense, see also Audier, *supra* n. 2. By contrast, see Moishe Postone, *Time, Labor and Social Domination: A Reinterpretation of Marx's Critical Theory* (Cambridge University Press, 1993). In this important book, Postone re-reads Marx's works and argues that they do not just criticize the unequal distribution of value in the capitalist system, as traditional Marxism repeats. More fundamentally they would criticize the prevailing representation of value, that is, what is and should be valued. Postone proposes an anti-productivist re-interpretation of Marx's works, and hypothesizes that Marx would not have sided with the workers' movement but rather with the new ecologist or feminist social movements that criticize the ubiquity of productive labour as well as the usual representation of wealth.

<sup>49</sup> Kende, *supra* n. 9. In his famous *Stone Age Economics* (de Gruyter 1972), American anthropologist Marshall Sahlins argued that, contrary to received ideas and unlike contemporary societies, primitive societies were actually 'societies of abundance', in which needs were few and could therefore be easily met.

legal relationship is primarily wage labour, that is, work done for payment within a subordinate employment relationship. Can it be inferred from the lack of any express reference to productive work that national systems of social law have no concern for the question of growth, unlike international social law? Rather, we argue – and demonstrate below – that if the concept of productive work is formally absent from bodies of national social legislation, it is simply because in liberal economies it is wage labour, i.e., the social and legal construction of work as a commodity that can be exchanged for payment, that is seen as the prime means of increasing output and wealth. Controlling and promoting the development of wage labour is the main means of supporting the productivist model. Wage labour thus operates as a proxy for productive work within national systems of social law.

This primacy of wage labour rests on two major developments in the history of thought. First, economics narrowed the concept of productive work in the late nineteenth century. Since then, only work that produces a good or service with an exchange value in the market was deemed to create value.<sup>50</sup> This shift was the outcome of the shift away from the labour theory of value first developed by Smith (see subsection 3.1.) and taken up and extended by Ricardo and then Marx. It was superseded by the utility theory of value forged by the founders of neoclassical economics, Walras, Jevons and Menger. In utility theory, the value of a good does not depend on the objective amount of labour required to produce it. It depends only on the subjective appraisal by individuals, in other words of potential buyers, of its utility.<sup>51</sup> While economists had argued for more than a century about the distinction between productive and unproductive labour and about the exact determinants of the value of a good, the proponents of the neoclassical strand were to abandon this debate and concentrate instead on price formation mechanisms. They posited that work should be thought of as productive whenever its fruit acquired some exchange value, that is, when the market recognized its value. Work is therefore assumed to create wealth whenever the goods and services it produces are exchanged for some price: the price for which they are bought and sold on the market determines the question of their value. This value depends solely on consumers' perception of the level of utility. In this way, the market becomes the adjudicator of wealth creation.<sup>52</sup>

Second, labour itself came to be treated as a commodity.<sup>53</sup> Through the legal trope of wage labour, work was conceptualized as something that can be detached from whoever performs it, as something that can be bought and sold in a market,

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<sup>50</sup> Méda, *supra* n. 46, at 208.

<sup>51</sup> George J. Stigler, *The Development of Utility Theory*, 58 J. Pol. Econ. 307–327 (1950).

<sup>52</sup> For a critical interpretation of the understanding of wealth in economics, from a social and ecological perspective, see Postone, *supra* n. 48.

<sup>53</sup> In this connection, see again Méda, *supra* n. 46, at 65–73.

i.e., the labour market. It is this trope, wage labour, that was considered in mainstream economic thought to be the best vehicle for increasing production. Clearly, the worker can exchange the good or service he or she produces against payment. This is self-employment. Such work is productive because it creates exchange value. But it is wage-earning that seems to be the form of organization of work that is best able to create value at large scale, because it enables the division of labour.<sup>54</sup> The owner of the means of production can purchase the labour needed for production and then break down the complex work to be performed into a host of simple tasks carried out by specialized and therefore more efficient workers, thus producing greater value over a given span of time.<sup>55</sup>

By offering subordinate workers status and protection, social law puts in place countermeasures to the free market but, as a result, it makes the construction of work as a commodity bearable and legitimizes it *de facto*.<sup>56</sup> It thus contributes to the spread of productivism. But that is not all: social law also directly aims, among other purposes as will be seen below (see subsection 4.2.), at fuelling economic growth and turning human beings into productive beings. In this sense, providing support for productivism is not only an objective effect but also an intrinsic purpose of social law. The examples of collective labour law and social security law are instructive here.<sup>57</sup>

For decades, collective bargaining between employers and trade unions has been centred on increasing wages in exchange for gains in productivity.<sup>58</sup> The promotion of growth is thus here a central feature. As regards national systems of social protection, they do not confine themselves to compensating wage labour by protecting workers against social risks related to labour market participation such as illness, unemployment or old age. Unemployment benefits, for instance, are a powerful illustration of the active role that social security systems play in shifting

<sup>54</sup> In that sense, see also Tony Fitzpatrick, *supra* n. 37, at 97.

<sup>55</sup> For praise of the division of labour and its potential for increasing the wealth of nations, see Adam Smith, *The Wealth of Nations* and more especially Book I, 'Of the causes of improvements in the productive powers of labour' and its first chapter on the division of labour. See also Hugh Collins, *Theories of Rights as Justifications for Labour Law*, in *The Idea of Labour Law* 137 (Guy Davidov & Brian Langille eds, Oxford University Press 2011) who emphasizes that labour law is also designed for 'promoting productive efficiency'.

<sup>56</sup> In this sense, Simon Deakin explains that labour law creates the conditions 'which make labour markets possible' (*The Contribution of Labour Law to Economic and Human Development*, in *The Idea of Labour Law* 156 (Guy Davidov & Brian Langille eds, Oxford University Press 2011)).

<sup>57</sup> See also Noah Zatz's fascinating analyses of the forms of work that develop out of the scope of protection of employment law (such as workfare measures or prison work), on the basis of which he demonstrates that employment law directly contributes to shape the labour market (*Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 *Vanderbilt L. Rev.* 857 (2008)).

<sup>58</sup> Norbert Reuter, *Employment in the Tension Between Ecology and Distributive Justice. The Role of Trade Unions*, in *Post-Growth Work. Employment and Meaningful Activities Within Planetary Boundaries* 85 (Irmi Seidl, Angelika Zahrt ed, Routledge 2021).



the entire society towards increased production. The granting of benefits is conditioned, among other things, on the dual requirement that the unemployed person be available for the labour market and that he or she not work while receiving benefits. First, in order to maintain their entitlement to benefits, the unemployed must comply with certain legal requirements such as being available for work, accepting any suitable job offer, and making efforts to find employment. From this perspective, social security systems provide a legal basis for the requirement to (seek) work, provided that the work that is promoted is that which is done in the market.<sup>59</sup> In this way, social security law takes up the running from the liberal utopia in which work is perceived as a moral duty of individuals towards society (see subsection 3.1.). Since the 1990s, this link between social security and the labour market has tended to be strengthened, so as to increase transitions from the first to the second. Social protection systems in European and North American countries have all experienced a turn towards activation.<sup>60</sup> This turn consists of the multiplication of measures aimed at bringing those who are unemployed and in receipt of social benefits closer to participation in the labour market.<sup>61</sup> Whereas unemployment used to be understood as a period distinct from productive work, it has therefore now been described as a period on a continuum with paid employment, which has to be spent in productive activities, ranging from reacting to job offers, training proposals, internships opportunities or unpaid work programmes.<sup>62</sup> Second, the unemployed must be deprived of work to be entitled to benefits. As a result, while the unemployed must seek to get back into the job market as quickly as possible, they must certainly not, in the meantime, harm workers by engaging in activities liable to compete with activities that create exchange value. Unemployment benefit thus seem to reflect the conviction of the founders of economic liberalism

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<sup>59</sup> See e.g., Bob Hepple, *A Right to Work*, 10 Indus. L. J. 65, 70; Amir Paz-Fuchs, *The Right to Work and the Duty to Work*, in *The Right to Work. Legal and Philosophical Perspectives* 177 (Virginia Mantouvalou ed., Hart 2015). On the centrality of social protection in the definition of a growth regime, as it affects both the demand and the supply sides of the economy, see Sonja Avlijaš, Anke Hassel & Bruno Palier, *Growth Strategies and Welfare State Reforms in Europe in Growth and Welfare in Advanced Capitalist Economies. How Have Growth Regimes Evolved?* 372–436 (Anke Hassel & Bruno Palier eds, Oxford University Press 2020).

<sup>60</sup> For a comparative overview, see e.g., Jean-Claude Barbier & Wolfgang Ludwig-Mayerhofer, *The Many Worlds of Activation*, 6 Eur. Societies 423 (2004); *Reshaping Welfare States and Activation Regimes in Europe* (Amparo Serrano Pascual & Lars Magnusson eds, P.I.E.-Peter Lang 2007); *Bringing the Jobless Into Work? Experiences With Activation Schemes in Europe and the US* (Werner Eichhorst, Otto Kaufmann & Regina Konle-Seidl eds, Springer 2008).

<sup>61</sup> Elise Dermine & Daniel Dumont, *Activation Policies for the Unemployed, the Right to Work and the Duty to Work: Which Interactions?*, in *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* 11 (Elise Dermine & Daniel Dumont eds, P.I.E.-Peter Lang 2014).

<sup>62</sup> Lisa Adkins, *Out of Work or Out of Time? Rethinking Labor After the Financial Crisis*, 111 S. Atl. Q. 621 (2012).

that any activity outside of the market relationship ought to be considered asocial and therefore kept to a bare minimum.<sup>63</sup>

Since it is rooted in economic liberalism, social law is shaped in such a way that, whether in terms of framing the employment relationship or in terms of social security, its mechanisms validate the market as the adjudicator of value creation. It is the market exchange that draws the dividing line between work worth promoting and that which should not be promoted. Many commentators have shown, though, that the sum of individual utilities, that is of particular interests, cannot be equated with social utility as it can be identified at the end of a carefully argued discussion or a collective deliberation – rather than by the market.<sup>64</sup>

First, certain categories of jobs offered in the labour market may well prove to be of little added value for the community. This is what tends to be illustrated by the recent surveys conducted on ‘bullshit jobs’,<sup>65</sup> these jobs that are developing in the service sector and seem to be devoid of any social utility sometimes even from the point of view of the workers themselves. Personal shoppers or call-centre employees spring to mind. Worse still, some jobs are decidedly harmful for the community as a whole. Here one might think of the worker on a production line for weaponry exported to dubious regimes, the engineer tasked with ‘optimizing’ programmed obsolescence, the chemist involved in making a medicinal drug the need for which is fabricated out of thin air by the pharmaceutical industry, and so on. Accordingly, making the market the adjudicator of wealth may result in a truncated image of what wealth is. This shows through plainly in the way our indicator of wealth, gross domestic product (GDP), is constructed. GDP is the sum of the value added, calculated at market price, produced by each economic unit (households, businesses and government agencies). It accounts only for the private utilities of these units regardless of the social disutilities, that is, the nuisances generated for society by the act of production in terms of violence, harm to public health or environmental pollution.<sup>66</sup>

Second, and conversely, some activities which can reasonably be thought to be obviously ecosocially useful are not carried out within the framework of market exchange. This may be because the goods or services produced by the activity in question do not find buyers because demand is not solvent (scientific research into

<sup>63</sup> Tanghe, *supra* n. 31, at 222.

<sup>64</sup> See especially Méda, *supra* n. 46, at 208–217, and the references cited.

<sup>65</sup> The expression was popularized by the American anthropologist and activist David Graeber: *On the Phenomenon of Bullshit Jobs*, 3 *Strike! Magazine* (2013). See the attempted systematization in *Bullshit Jobs: A Theory* (Simon & Schuster 2018).

<sup>66</sup> See *Post-growth Economics and Society: Exploring the Paths of a Social and Ecological Transition* (Isabelle Cassiers, Kevin Maréchal & Dominique Méda eds, Routledge 2017); Isabelle Cassiers & Géraldine Thiry, *A High-Stakes Shift: Turning the Tide from GDP to New Prosperity Indicators*, in *Redefining Prosperity* 22–40 (Isabelle Cassiers ed., Routledge 2015); Zbyszewska, *supra* n. 35, at 19–22.

certain rare illnesses or the production of organic vegetables at fair prices), or because they are performed in the domestic sphere (care for relatives), or yet because the provider does not wish to be paid (voluntary work).<sup>67</sup> Again our wealth indicator takes scarcely any account of this. While the non-market sector is now included in GDP, only the costs of these services for the state is actually included in the national accounts, that is, the financial support given to them and not the value provided by the said services, which is never measured.<sup>68</sup> Dominique Méda concludes from this that ‘we have never reconsidered the idea that a good or service are not a source of increased wealth unless they can be sold or exchanged’.<sup>69</sup>

On this last point, it will be seen in the next section, however, that while social law institutes and promotes labour as a commodity, it also make it possible by various mechanisms to promote activities that are not accomplished through the interplay of supply and demand.

#### 4 SOCIAL LAW AND THE AUTONOMY OF INDIVIDUALS: THE (EMBRYONIC) PROMOTION OF ECOSOCIALLY USEFUL ACTIVITIES

The previous section showed that social law endorsed the productivist model and contributed to its spread. This third and last section adds nuance to this affirmation: it would be unfair and excessive to reduce social law to a mere vehicle for propagating productivism. Social law also pursues other ends. Those ends are to promote the autonomy of individuals and self-fulfilment, which might lead them to question productivism or even to break free from it.

In international social law, the element that relativizes and can even challenge productivism lies primarily in the legal trope of freely chosen work. This component of the right to work prevents the instrumentalization of the right to work for productivist ends and its reduction to a duty to work. As regard to national social law systems, they play a function of decommodification of individuals. In effect, this means that they secure their economic security through various mechanisms, but also, more importantly, that they support the possibility of carrying out activities that are not valued by the market although they are (eco)socially useful.

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<sup>67</sup> For other examples of ecosocially contributory though economically non-productive activities, see Routh, *supra* n. 35, at 45.

<sup>68</sup> For a first attempt at economic evaluation of social utility of some occupations, see Eilis Lawlor, Helen Kersley & Susan Steed, *A Bit Rich. Calculating the Real Value to Society of Different Professions* (New Economics Foundation 2009), [www.neweconomics.org](http://www.neweconomics.org).

<sup>69</sup> Méda, *supra* n. 46, at 210.

## 4.1 INTERNATIONAL SOCIAL LAW AND THE PROMOTION OF FREELY CHOSEN WORK

It has been seen that international social law makes full and productive employment a central objective of national government action (subsection 3.1). Alongside this, it lays down a further requirement that is not without putting a strain on the former: individuals must be able to choose their work freely.<sup>70</sup>

Thus, the right to work enshrined in Article 6 of the ICESCR includes, alongside the development by the States Parties of policies to ensure full and productive employment, the right of everyone to the opportunity to earn a living ‘by work which he freely chooses or accepts’. The mirror provision in Article 1 of the ESC calls on States likewise to protect effectively workers’ right to make their living ‘in an occupation freely entered upon’ (§2). Since it protects the free choice of employment, the right to work does not just entail obligations to fulfil, involving increasing the number of jobs available; it also entails obligations for the authorities to respect and protect.<sup>71</sup> As such, the right to work requires States to refrain from impeding free access to the labour market and the free choice of employment (obligation to respect), and it requires them to prevent third parties from interfering with those same freedoms (obligation to protect). International case law has progressively specified the content of these different obligations.<sup>72</sup>

The ILO also protects the freedom of individuals to choose their employment through the standards it has developed for employment policy and the fight against unemployment. International labour standards require states to develop an active policy to promote full employment that is not just productive but also freely chosen. Under the Employment Policy Convention, 1964 (No. 122) national steps to promote employment must simultaneously ensure that work ‘is as productive as possible’ and that ‘there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited’ (Article 1, §2, (b) and (c)). The Employment Promotion and Protection against Unemployment Convention,

<sup>70</sup> On the origins of this requirement in the debates on the wording of the right to work in the post-war international covenants, see Dermine, *supra* n. 38, at 105–136 and the many references cited.

<sup>71</sup> As is well known, all fundamental rights, regardless of which generation they belong to, impose three types of obligation on States: to respect, to protect and to fulfil. See O. De Schutter, *International Human Rights Law. Cases, Materials, Commentary* Chs 3, 4 and 5 (Cambridge University Press 2019).

<sup>72</sup> For a detailed analysis and critical discussion of this case law, see Elise Dermine, *Activation Policies for the Unemployed and the International Human Rights Case Law on the Right to Freely Chosen Work*, in *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* 139–177 (Elise Dermine & Daniel Dumont eds, PIE-Peter Lang 2014), and the many references cited. On the case law of the supervisory bodies of the ICESCR and the ESC, that is, the Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee on Social Rights (ECSR), relating to the right to work, see also Colm O’Cinneide, *The Right to Work in International Human Rights Law*, in *The Right to Work. Legal and Philosophical Perspectives* 99 (Virginia Mantouvalou ed., Hart 2015).

1988 (No. 168) is replete with references to ‘full, productive and freely chosen employment’.

According to the international case law, pursuing the right to productive work (obligations to fulfil) cannot be achieved at the expense of the right to freely chosen work (obligations to respect and protect). In its General Comment No. 18 on the right to work, the United Nations Committee on Economic, Social and Cultural Rights (CESCR), which is the body of experts tasked with supervising states’ implementation of the ICESCR, referred to ILO Convention No. 122 in interpreting Article 6 of the Covenant. It noted that the Convention links ‘the obligation to create the conditions for full employment with the obligation to ensure the absence of forced labour’.<sup>73</sup> In international human rights law, productive work is therefore actually valued as a human right only if – and this is the crucial point – it is freely chosen.

This requirement of international social law reflects the expressive function that work has been acknowledged in contemporary liberal societies. We have seen that the right to work was established in the late eighteenth century as an instrument to speed the advent of the utopia of a market society. Work was recognized in its economic and social functions in that it is a factor of production and increase of wealth (subsection 3.1.). Paradoxically, it is this very ‘economicist’ view that brought work into the fold of human rights. In a model of society in which it was called upon to become the main means of providing for oneself, work became consubstantial with the first of all rights, the right to life, understood as the right to subsistence.<sup>74</sup> Initially work was therefore valued as a means of subsistence (instrumental function); it was not considered as a beneficial activity in itself. Smith, for example, saw labour as an effort, or even pain, enabling individuals to satisfy their needs and build a community. However, the early nineteenth century saw a wholesale renewal in the social representation of work. Beyond its instrumental function, work was recognized as having intrinsic virtues. It came to be thought of as a worthwhile activity in itself that should enable individuals to express their individuality and flourish (expressive function).<sup>75</sup> The right to life was then no longer understood merely as a right to subsistence, but also a right to self-fulfilment. The right to work as an ethical requirement came out of this all the stronger.

<sup>73</sup> CESCR, *General Comment No. 18: The Right to Work (Article 6 of the Covenant)*, doc. E/C.12/GC/18, 2005, §4.

<sup>74</sup> On social rights being propped up by the right to life, see Fernand Tanghe, *1848 and the Question of the droit au travail. A Historical Retrospective*, in *Activation Policies for the Unemployed, the Right and the Duty to Work* 24–25 (Elise Dermine & Daniel Dumont eds, PIE-Peter Lang 2014).

<sup>75</sup> See Dominique Méda, *The Future of Work: The Meaning and Value of Work in Europe*, ILO Research Paper No. 18 (2016) and Hugh Collins, *Is There a Human Right to Work?*, in *The Right to Work. Legal and Philosophical Perspectives* 32–37 (Virginia Mantouvalou ed., Hart 2015), both referring to Marx’s work.

It is the material support of individuals' subsistence but also the vector of their blooming. From this perspective, work should not only be remunerated: it should be freely chosen.

This enrichment of functions assigned to work crops up clearly in the *travaux préparatoires* of the international covenants in the wake of the Second World War, a century later. It is striking that states in both blocs concurred on this cardinal point, despite their deeply divided views on many other issues. Where the initial draft of the ICESCR defined the right to work as the possibility of working to earn a living, in the end a wording was preferred that clearly indicated that the work being remunerated is just one aspect of that right, and that the work should also be freely chosen and accepted. This modification was suggested on the ground that the right to work does not mean simply 'the right to remuneration but [also] the right of every human being to do a job freely chosen by himself, one which gives meaning to his life'.<sup>76</sup>

Similarly, one of the preambles contemplated in drawing up the ESC provided that ensuring the right to work was the 'primary condition' to be met to give people 'the possibility of fully using all their abilities'.<sup>77</sup> Although in the end a far more concisely worded preamble was adopted, the authors of the ESC deliberately chose at the end of debates over the central character of work, to make the right to work the first of all the rights enshrined, ahead of the rights to social security and social assistance. This was because, unlike the ESC, the right to work in Article 1 of the Charter set out an emancipatory aim, which looked beyond the instrumental function of securing the means of subsistence. Some years later, the drafters of the ICESCR also gave precedence to the right to work among the set of social rights.<sup>78</sup>

It should be further emphasized that nowadays, half a century later, the CESCR explicitly relates the affirmation of work as a human right to both of its instrumental and expressive functions. While the Committee takes the view that 'every individual has the right to be able to work, allowing him/her to live in

<sup>76</sup> Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on Its Development 197* (Clarendon Press 1995) (citing an intervention by the representative for France). After a detailed analysis of the preparatory works for Art. 6 of the ICESCR, Matthew Craven concludes that the provision values work for itself: 'For many, work represents the primary source of income upon which their physical survival depends. Not only it is crucial to the enjoyment of "survival rights" such as food, clothing, or housing, but it affects the level of satisfaction of many other human rights such as the rights to education, culture, and health. Art. 6, however, is not so much concerned with what is provided by work (in terms of remuneration), or the conditions of work, but rather with the value of employment itself. It thus give recognition to the idea that work is an element integral to the maintenance of the dignity and self-respect of the individual'.

<sup>77</sup> Council of Europe, *Charte sociale européenne: recueil des travaux préparatoires*, Strasbourg, vol. III, 1956, at 634, <https://rm.coe.int/16806c1be7> (our translation).

<sup>78</sup> Richard L. Siegel, *Employment and Human Rights. The International Dimension 70* (University of Pennsylvania Press 1994).

dignity’, it adds that ‘the right to work contributes at the same time to the survival of the individual and to that of his/her family, *and* insofar as work is freely chosen or accepted, to his/her development and recognition within the community’.<sup>79</sup>

This brief flashback shows the ambivalence of the material sources of the right to work.<sup>80</sup> This right lies at the confluence of economic liberalism (affirmation of the market society) and political liberalism (affirmation of human rights and pluralism of values). Earlier (subsection 3.1.), we showed that the idea of the right to work emerged as a political instrument of market ideology. If shaped by this worldview alone, the right could then encompass any work so long as it is productive. In that perspective it would be no more than an extension of the social duty to work inherent to societies based on productivism. However, we have demonstrated now that work has rapidly become, within the productivist model, the central means of providing for oneself and then of individual fulfilment, being associated with the claim to the human right to life. Having joined the circle of human rights, the right to work can escape from any attempt to instrumentalize it for political ends, which would involve naturalizing one particular conception of society in order to impose it definitively. This second social source of the right to work, i.e., the affirmation of human rights and the pluralism of values, is materialized through the enshrinement of the free choice of employment. Through this component, the right to work sets out limits on the duty to work. As such, it opposes its instrumentalization for productivist ends and can form a resource for contesting economic liberalism and the naturalization of the market.

#### 4.2 NATIONAL SYSTEMS OF SOCIAL LAW AND THE DECOMMODIFICATION OF INDIVIDUALS

In market economies, social law has been built on the observation that workers are not a commodity, or at least not a commodity like others. Unlike other commodities, they must as human beings ensure their own and their family’s survival. This means they cannot defer their entry into the market until the price offered for their labour – that is, the wage – is reasonable.<sup>81</sup> Under these circumstances, market interplay is distorted and the freedom of individuals to choose their employment is largely fictive. It is by ensuring subordinate workers a protected status with a view

<sup>79</sup> CESCR, *General Comment No. 18: The Right to Work (Article 6 of the Covenant)*, §1 (emphasis added).

<sup>80</sup> See Dermine, *supra* n. 38, at 54–67. See also Guy Mundlak, *The Right to Work – The Value of Work*, in *Exploring Social Rights: Between Theory and Practice* 356 (Daphne Barak-Erez & Aeyal Gross eds, Hart 2007).

<sup>81</sup> Hugo Sinzheimer, *Das Wesen des Arbeitsrechts* (1927) in *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* 108–110 (Hugo Sinzheimer ed., Bund Verlag 1976) and Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Ch. 6 (Beacon Press 2001 – originally published in 1944).

to adjusting the balance of power between workers and the owners of the means of production, that social law has managed to effectively secure, to some degree at least, the possibility of freely choosing one's employment. Each of the components of social law contributes to this institutionalization of autonomy.

Through its individual and collective dimensions, labour law has replaced the worker, as a subject of law, within market exchange and contract law. While admitting that work is the object of a contract on the market, labour law protects the physical integrity, economic security and identity of the worker as a person.<sup>82</sup> To take just one example, the 'price' of labour is not determined by the market (alone), but by remuneration schemes collectively bargained at the level of the country, the sector of activity or the company, so as to ensure economic security. Labour law can thus offset the asymmetry in the stand-off between employer and worker.<sup>83</sup> For its part, social security benefits ensure a degree of material independence to individuals at the gates or on the margins of the labour market further to the occurrence of a social risk. The right to unemployment benefits, more particularly, enables workers who are deprived of employment against their will to live decently outside the labour market until they can find suitable employment. Through the supervision of wage labour, social law materializes the general invitation from international law to protect the free choice of employment of workers and to avoid the right to work being converted de facto, in the context of a market economy, into a duty to work.

How can the action of social law be characterized more accurately? In his famous book *The Three Worlds of Welfare Capitalism*, the sociologist Gøsta Esping-Andersen considers that welfare states fulfil a function of de-commodification of individuals in a market economy where their survival depends on hiring their labour force in the labour market.<sup>84</sup> He defines de-commodification as giving individuals the possibility of continuing to meet their fundamental needs and maintaining an acceptable living standard outside of participation in the labour market. The comparative sociologist emphasized that de-commodification is a question of degree. All welfare states are de-commodifying to some degree, depending on the extent to which they make it easy to withdraw from the market while managing to ensure one's subsistence.<sup>85</sup> In the following we first discuss this definition of de-commodification. On the basis of the criticisms raised, we then

<sup>82</sup> Alain Supiot, *Critique du droit du travail* 51–107 (Presses Universitaires de France 2002 – originally published in 1994); in English, see from the same author: *Labour Is Not a Commodity: The Content and Meaning of Work in the Twenty-First Century*, 160 *Int'l Lab. Rev.* 6 (2021).

<sup>83</sup> Otto Kahn-Freud, *Labour and the Law* 6 (2d edn., Stevens & Sons 1977); Sinzheimer, *supra* n. 81, at 117–24 cited in Dukes, *supra* n. 10, at 16–17; Fudge, *supra* n. 33, at 122.

<sup>84</sup> Esping Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).

<sup>85</sup> *Ibid.*, at 23.



propose a reconceptualization of the notion that takes into account the part played by welfare states and national systems of social law in the relaxation of the productivist model, which is overlooked in Esping-Andersen's work.

Esping-Andersen's definition of decommodification is worth discussing on three levels.

First, Esping-Andersen based his definition on his main research focus, namely on social protection systems. Accordingly he concentrated on how generous social benefits were (i.e., the extent of their coverage and their amount), so as to measure the degree of decommodification achieved in each country. However, labour law also contributes to the decommodification of individuals. Its input is completely left in the shadow in Esping-Andersen's work. Oddly enough, to the best of our knowledge, this point has not been picked up on.

Second – and this is a familiar criticism developed mainly by the feminist strand –, Esping-Andersen's definition of decommodification, like the criteria selected to measure it, neglect a crucial function of the welfare state, namely the promotion of access to the labour market. It is not because the welfare state ensures to some extent the possibility for individuals faced with a social risk to live outside of the labour market for a certain period of time that it has reached the point of promoting the payment of social benefits more than insertion in the employment market.<sup>86</sup> We have seen that social security systems promote the development of wage labour and have turned the moral duty to work into a legal obligation (subsection 3.2.). This is all the more the case since the turn to activation taken by welfare states since the 1990s.<sup>87</sup>

Third, and this is the most important point for our argument here, the definition of decommodification by Esping-Andersen does not account for the fact that all welfare states develop, in different parts of social law, a variety of mechanisms for remunerating or compensating socially useful activities that would not be promoted if left to the interplay of supply and demand. In other words,

<sup>86</sup> See especially Ann S. Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and the Welfare State*, 58 *Am. Sociological Rev.* 303 (1993); Graham Room, *Commodification and Decommodification: A Developmental Critique*, 28 *Pol'y & Pol.* 331 (2000); Theo Papadopoulos, *The Recommodification of European Labour: Theoretical and Empirical Explorations*, European Research Institute Working Paper no. 3 (2005). For an excellent summary of these debates, see Jingjing Huo, Moira Nelson & John D. Stephens, *Decommodification and Activation in Social Democratic Policy: Resolving the Paradox*, 18 *J. Eur. Soc. Pol'y* 5 (2008).

<sup>87</sup> The activation of the unemployed can involve a recommodification backwards from the decommodification function of welfare states, or in other words a lower degree of decommodification. This is the case when activation measures involve a reduction in the generosity of social benefits in order to increase economic pressure on welfare recipients to accept employment in the labour market. However, this is not always the case: activation can also be achieved through the development of rights, services or opportunities for the unemployed in order to bring them closer to the labour market (job search support, training, etc.). It is often said that activation is then based on a human capital logic (Elise Dermine, *The Right to Work: A Justification for Welfare-to-Work ?*, *supra* n. 38).

social law markedly relativizes pure market logic, for example by subsidizing jobs in the non-market sector, by offering multiple forms of leave for workers, or by granting the unemployed exemptions from job seeking so as to learn new skills or take care of a sick relative. We shall return to these various mechanisms in a moment.

On the basis of these three criticisms, we propose a new definition of the concept of decommodification, which seems to us to be better articulated with the phenomenon to which it responds, i.e., the commodification of work, and better able to account for the distance taken by national systems of social law from the productivist imperative.<sup>88</sup> Where complete commodification of work would make work a commodity to be exchanged solely in the marketplace and at a price dependent only on supply meeting demand, the decommodification of workers refers to all the arrangements that seek on the contrary to disconnect income from the exchange value in the labour market so as to increase workers' individual autonomy.

With this definition it is possible to account for the effect of social protection but also of labour law (first criticism) and so apprehend all of social law using a single matrix. The definition also makes it possible to avoid the criticism levelled at Esping-Andersen of overvaluing the subsistence function provided by the welfare state compared to the function of promoting the broadest possible access to the labour market (second criticism). Decommodification as redefined here is not opposed to integration into the labour market. There is no seesaw effect between the two. Last, and foremost, this definition lends visibility to a function of social law that has been very much left in the shadow (third criticism). Social law is not only confined, as is usually emphasized, to adjusting the balance of power in negotiating employment and pay conditions and ensuring a fairer distribution of productivity gains for workers – especially by way of collective wage bargaining. By various mechanisms, it also relativizes the central character of labour as a commodity and the productivity logic by enfolding within a legal relationship socially useful activities for which there is no buyer, or that could find one but at an insufficient price, in the framework of a market exchange, or activities that simply are not meant to be performed in the market. Social law is therefore not just the law of autonomy within the market relationship.<sup>89</sup> It is also the law of

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<sup>88</sup> For a first attempt to compare welfare states according to their post-productivist concern, see Goodin, *supra* n. 37. See also Robert Van der Veen & Loek Groot, *Post-Productivism and Welfare States: A Comparative Analysis*, 36 *Brit. J. Pol. Sci.* 593–618 (2006). In describing the post-productivist model, however, they focus on the possibility of opening up and maintaining entitlement to welfare benefits outside of labour market participation, but do not consider the way in which the state promotes and supports the development of low or non-productive activities in the economic sense. Their conception of the post-productivist model is therefore not far removed from the notion of decommodification as defined by Esping Andersen.

<sup>89</sup> *Contra*: Routh, *supra* n. 35, at 41–48.

autonomy outside of it. It is not just the law of ‘mediate autonomy’, to adopt Antoine Bailleux’s terminology, meaning mediated by the market, but also the law of ‘im-mediate autonomy’.<sup>90</sup>

On this last point in particular, the proposed reconceptualization of decommodification enables us to show that social law does not just play an ambivalent part with respect to capitalism, by contributing to its consolidation while amending it at the same time, by allowing workers to enjoy a part of the wealth created by their contribution to the market (section 2). It also maintains more broadly an ambiguous relationship with productivism. Admittedly it is on the one hand essentially wage labour, which is viewed as productive because it is exchanged on the market, that social law seeks to protect and also to promote. And it does so, as a general rule, without concern for the social value of good or service produced by the worker, beyond the individual utility for its purchaser. But on the other hand social law nonetheless promotes, via various mechanisms, certain activities that have no market value or that are not intended to be exchanged on the market but that are still socially useful. It thus extends our conception of wealth beyond the mere exchanges accomplished on the market.

Unless we are mistaken, this function of social law has attracted little attention. Social law is generally depicted as the law of autonomy within the market sphere. However in some areas it goes further and emancipates itself from the productivist logic, with a view to widening individuals’ prospects of autonomy and self-fulfilment. Within the limits of this contribution, we limit ourselves here to providing a preliminary overview of the different types of mechanisms that are involved in labour law and social security law.

Labour law was developed primarily to protect subordinate workers whose labour is purchased on the labour market. But, by different mechanisms, it actually does far more than that. For example, employment subsidies in the non-market sector support the demand for labour, so as to bring within the sphere of paid employment activities that, if there were no interventions of this type, would not find any solvent demand on the market although they are socially useful. The social law of the civil service also contributes to the decommodification of labour in offering status and remuneration to workers whose activity has been judged socially useful by the community outside of the mechanism for matching supply and demand. Working time regulations free up time for rest and for other cultural, social or leisure activities. Finally, there are other measures aimed at enabling workers to better reconcile professional and private life. Through various forms of leave, employment contract law attaches to the status of employee the possibility

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<sup>90</sup> Antoine Bailleux, *Dissoudre l'événement ou exposer la crise ? Le système, le répertoire et les dés juridiques d'une prospérité sans croissance*, 104 *Droit & société* 116–119 (2020).

of temporarily suspending the performance of the contract, sometimes just part-time, without risking losing their job and while keeping an income, in order to promote the development of activities deemed to be useful such as getting involved in politics, taking care of a sick relative or learning new skills.

Social security law is also rich in mechanisms that disconnect the income allocated from the past or future performance of paid work. Although access to replacement income is generally dependent on a certain work history, regulations on, for example, retirement pensions, incapacity for work benefits or unemployment benefits often contain provisions that assimilate to work days during which no paid work was actually done, such as annual vacations, maternity leave, and other kinds of paid leave. This assimilation rests on the basis that these are periods and activities that are important in themselves, not just for the purpose of preserving the workforce, and should therefore provide entitlements for social benefits. In parallel, some arrangements depart from the basic principle that welfare recipients of working age and capable of work must try to get into the labour market. The unemployed may, for example, be exempted from the generic requirement of being available for work while continuing to receive benefits because they have gone back into education or vocational training and for other reasons that vary among countries, such as caring for a relative. Similarly, social assistance regulations provide that the recipients may be relieved from the standard obligation of being ready to work while continuing to collect a social assistance benefit for a series of reasons relating to health or equity (dependent children, literacy courses, and so on). More generally, beneficiaries of social security benefits may in principle and under certain conditions engage in voluntary activities without it affecting their allowances, because they are not meant to be condemned to being wholly inactive, and a commitment to clubs and associations is promoted in the societies we live in.<sup>91</sup>

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<sup>91</sup> In this respect, it is important to distinguish volunteering from a recent trend that has been challenging national welfare states, and more specifically social assistance systems, i.e., workfare measures (on this trend, see *Welfare to Work in Contemporary European Welfare States: Legal, Sociological and Philosophical Perspectives on Justice and Domination* 67 (Anja Eleveld et al. eds, Policy Press 2020). In this case, it is no longer an issue of allowing social benefit recipients to volunteer while maintaining their benefits. Rather, it is about conditioning the granting of their social assistance benefits on the performance of unpaid work in the private, public or non-profit sectors. In some cases, workfare measures are part of the activation logic (subsection 3.2.), with a focus on the labour market and aim at ensuring that their participants will later take up regular, paid and productive employment (on the activation logic, see *supra*, n. 61). But in other cases, mandatory participation in work programmes may be an end in itself and does not aim at increasing transitions to regular jobs in the labour market. Workfare measures are then based on a logic of reciprocity rather than on a logic of activation: it is considered that social benefits recipients must participate in and contribute to society in exchange for their entitlement to social assistance benefits (Amir Paz-Fuchs & Anja Eleveld, *Workfare Revisited*, 45 *Indus. L. J.* 177 (2016)). In this second perspective, the activity does not necessarily have to be productive but rather socially useful (Renaat Hoop, *Political-Philosophical Perspectives on the Duty to Work in Activation Policies for the Unemployed*, in *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* 33 (Elise Dermine & Daniel Dumont eds, PIE-Peter Lang 2014). Workfare measures may thus be or not

Heir to the growth paradigm, social law is therefore also – and this is a paradox, or at least a source of tension – the law *par excellence* of the autonomy and decommodification of individuals.

## 5 CONCLUSION: EMANCIPATING SOCIAL LAW FROM THE PRODUCTIVIST REQUIREMENT WITH A VIEW TO SOCIAL AND ECOLOGICAL TRANSITION?

The critical analysis conducted in this article reveals that social law nurtures an ambivalent relationship with productivism, both a support for this model and a vehicle for relativizing or even challenging it. Indeed, we have argued that our discipline, by supporting the autonomy of workers within the sphere of the market, has legitimized the construction of work as a commodity and contributed to turning the whole society towards the objective of growth, through the setting up of different mechanisms that foster consumption and the constant increase of production. At the same time we have highlighted that it also carries within it the seeds for the relaxation of the productivist logic, by recognizing, even if it is still in its infancy, the value of non-productive activities in the economic sense of the term. Autonomy is thus not only constructed by social law within the market sphere but also outside and beyond it. Accordingly this branch of law cannot be reduced to that of perpetuating the capacity to produce and consume.

To conclude, we finally turn to the field of possibilities, evoking, if only briefly, the scenario of a possible emancipation of social law from the productivist imperative. To this end, we shall first recall that in the 1980s and 1990s debates on the centrality and contours of work impelled researchers and politicians concerned about the inadequacy of the Fordist compromise – production against redistribution – in light of the overall transformations of the economic and social context (globalization of economies, technological progress, ageing of the population, women playing a more extensive role in the labour market). Some called for the concept of work to be extended beyond that of economically productive work, while others advocated more radically that work should no longer be considered a value.<sup>92</sup> These questions

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be part of the ideology of productivism. In any case, whether they are based on the logic of activation or the one of reciprocity, they raise issues under the fundamental right to freely chosen work discussed in subsection 4.1. (on this specific question, see Elise Dermine, *Limitation of Welfare to Work: the Prohibition of Forced Labour and the Right to Freely Chosen Work*, in *Welfare to Work in Contemporary European Welfare States: Legal, Sociological and Philosophical Perspectives on Justice and Domination* 67 (Anja Eleveld et al. eds, Bristol University Press 2020)).

<sup>92</sup> Among many others see Fred L. Block, *Postindustrial Possibilities* (University of California Press 1990); Bob Jessop, *The Transition to Post-Fordism and the Schumpeterian Welfare State in Towards a Post-Fordist Welfare State?* 13–37 (Roger Burrows & Brian Loader eds, Routledge 1994); Jeremy Rifkin, *The End of Work* (Tarcher/Putnam 1995); Claus Offe & Rolf G. Heinze, *Beyond Employment: Time, Work, and Informal Economy* (Polity Press 1992). Reference can of course also be made to the extensive debate

are nowadays also addressed from the perspective of the need for ecological transition. In this context, the primary concern is no longer to tweak the Fordist equation to fit with the economic and social transformations. The aim is, far more fundamentally, to apprehend the question of the future of work regulation and social protection with respect to building sustainable societies, and more specifically contemplating this future by means of a social model that would be freed from the growth paradigm.<sup>93</sup>

With this *Gestalt switch* in mind, we could imagine that, tomorrow, the right to work could become the hinge point of a democratic reflection on the exit from the productivist imperative. It seems to us that the confrontation with the real world and its contradictions could lead to a questioning of both the original roots of the right to work in economic liberalism and of the reduction of participation to insertion into the labour market.

If it is confirmed that post-industrial societies are trapped in an insoluble dilemma between the persistence of exclusion from productive work for a significant part of the population or the growing destabilization of the wage condition for workers, a debate should indeed take place with a view to redefining the contours of the right to work. If it were definitively impossible to provide employment for the entire working population that is at the same time productive and freely chosen, our societies might legitimately decide to uncouple the right to work from economic liberalism in order to overcome the growing tension between the right and the duty to work. Beyond the social dimension of the problem, the question of reformulating the right to work could be framed more broadly into a perspective of ecological transition. Under this new social contract, the right to work would no longer only cover productive work but any socially valued activity, regardless of whether or not it contributes to economic growth.<sup>94</sup>

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sparked by the proposal to institute a universal basic income, i.e., a floor of economic resources disconnected from the performance of work and guaranteed to all. See among many others, the reference book by Philippe Van Parijs & Yannick Vanderborght. *Basic Income. A Radical Proposal for a Free Society and a Sane Economy* (Harvard University Press 2017). However, there are many variants of the proposal. While some promoters of universal basic income see in it the materialization of a right to income freeing from economic activity, others, attached to the preservation of the right to work, argue that the guarantee of such an unconditional income constitutes precisely the best way to effectively secure the possibility of accessing employment, and to engage in socially useful activities in parallel. See for instance Guy Standing, *Why a Basic Income Is Necessary for a Right to Work*, 7(2), *Basic Income Stud.* 19 (2012). For a discussion in a social law scholar's perspective, Daniel Dumont, *Universal Basic Income as a Source of Inspiration for the Future of Social Protection Systems? A Counter-Agenda*, 24 *European Journal of Social Security*, forthcoming.

<sup>93</sup> Among many others, see Dominique Meda, *Work and Employment in a Post-growth Era*, in *Post-growth Economics and Society: Exploring the Paths of a Social and Ecological Transition* 13–30 (Isabelle Cassiers, Kévin Maréchal & Dominique Méda eds, Routledge 2018); on labour law in particular, see Routh, *supra* n. 35 and Zbyszewska, *supra* n. 35; Alain Supiot, *supra* n. 84. See also the growing body of literature on the ecosocial or sustainable welfare: Fitzpatrick, *supra* n. 37, especially Ch. 6: A Model of Ecowelfare 110–129; by the same author: *supra* n. 37; Hirvilammi & Koch, *supra* n. 37.

<sup>94</sup> Nicolas Bueno, for his part, proposes replacing the right to work with a right on the contrary to be freed from work: *From the Right to Work to Freedom From Work: Introduction to the Human Economy*, 33

At the national level, this would involve legally recognizing the contribution to the construction of a sustainable society of a whole range of human activities that are not valued by the market, by backing them up with social rights under certain conditions. Whereas social protection is currently still linked to productive labour, in the future it would then be socially useful activity, whether economically productive or not, that would trigger social protection. In other words, entitlement to rights would arise from the contribution made to ecosocial utility rather than to increased GDP. Viewed and reconstructed in this way, work would no longer be primarily an economic issue; it would also be an eminently political question, since it would be for democratic discussion and not the market to determine which activities have value for the community.

As we have shown, some legal arrangements in national systems of social law already promote the development of socially useful activities, even if in a highly experimental way and without any real overarching logic: periods of leave to better reconcile private and professional life, wage payments for useful but barely productive activities, exemption from the obligation to look for work for unemployment benefits recipients, and so on. These deviant arrangements from the productivist model have long been present in the interstices of our social law, but little thought out and even less made coherent. Adopting the approach to the role of committed critical legal scholars advocated by Unger,<sup>95</sup> we believe that it is possible to start from what already exists, that is, from the ‘deviant’ solutions, anomalies and exceptions already present in social law, in order to propose creative but rigorous interpretations of the current legal framework that would make it possible to loosen the productivist stranglehold under the ban of an enlarged right to work,<sup>96</sup> but also to take part in the normative debate on the reforms that need to be carried out in this perspective.<sup>97</sup>

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Int'l J. Comp. Lab. L. & Indus. Rel. 463 (2017) and *Freedom at, Through and From Work: Rethinking Fundamental Labour Rights*, 160 Int'l Lab. Rev. 311 (2021). At first sight, this proposal may seem remote from ours, especially in the use of the marked expression ‘freedom from work’. While we are sensitive to and share the concern for better promoting social diversity, the perspective of purely and simply abandoning the right to work seems to us to be wildly at odds with the (empirically trivial) observation that, in our societies, individual flourishing and self-esteem remain tightly linked to the feeling of utility and the social recognition that activity procures. But despite the terminology, Nicolas Bueno’s proposal is actually quite close to ours in that it aims, its author argues, to remove the constraint of productive work for the benefit of increased valuation of other activities. Its aim is therefore to reflect the question of labour beyond the productivist imperative. We fully concur with this invitation. However we are inclined to prefer as a flag, to disseminate this scenario, ‘freedom of work’ within the meaning given to it by Alain Supiot in his seminal paper *Le travail, liberté partagée*, 9–10 Droit social 715 (1993).

<sup>95</sup> On the institutional approach to critical legal studies defended by Unger, see *supra* n. 12, at 29.

<sup>96</sup> Reflections could for instance be conducted to identify concrete hypotheses where the right to freely chosen work could be mobilized to counter the dominant model of productivism. By way of illustration, one could imagine arguing that unemployed people cannot have their unemployment benefits cut if they refuse to accept work in a field of activity that is harmful to the planet.

<sup>97</sup> This ‘interstitial’ strategy is also inspired by the book of the American post-Marxist sociologist Erik Olin Wright, *Envisioning Real Utopias* (Verso 2010).

To progress in this line of thinking, we feel that a preliminary step for jurists should be to map and compare the different mechanisms in national systems of social law that contribute to promoting ecosocially useful activities. As noted by Unger, '(legal thought) can play a part in redressing the deficit of structural imagination. It confronts the enigma of structure at the level at which this enigma can best be understood and overcome: the level of detailed arrangements and representations'.<sup>98</sup> Concretely, this exercise would involve making a systematic analysis of those mechanisms and developing a typology that identifies the following: first, the different legal techniques used to promote the activities in question (exemption from conditions, subsidies, protection of the employment contract); second, the ways those activities are financed (by the State, by the social security system, by mutual insurance organizations, by companies, by workers); third, the type and purpose of the valued activities (care, training, political activities, voluntary work, etc.); fourth, and finally, the deliberative mechanisms for identifying what are deemed ecosocially useful activities worth promoting. Thereafter, it would be important to bring in other disciplines to evaluate these arrangements in terms of risks such as commodification of social life and expansion of the wage-earning realm,<sup>99</sup> forced labour or entrapment within a sphere of activity outside of the classical labour market. Such legal analysis informed by the insights of other disciplines might usefully fuel debate in civil society about the best way to free social law from the productivist imperative and to give humans greater autonomy.

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<sup>98</sup> Unger, *supra* n. 12, at 32.

<sup>99</sup> On this risk, see Adkins, *supra* n. 62, at 622 referring to the 'deprivatization of privacy' discussed by Ulrich Beck and to the process of relocation of care from the home to collective and commercial services documented by Selma Sevenhuijsen. See also Arlie Russell Hochschild, *Commercialization of Intimate Life: Notes from Home and Work* 242–244 (University of California Press 2003); Noah D. Zatz, *The Impossibility of Work Law*, in *The Idea of Labour Law* 234 (Guy Davidov & Brian Langille eds, Oxford University Press 2011); Noah D. Zatz & Eileen Boris, *Seeing Work, Envisioning Citizenship*, 18 *Emp. Rts. & Emp. Pol'y J.* 95 (2014). For a premonitory critique of the transformation into employment of domestic activities, or 'work for oneself', that were previously cost-free and autonomous (cooking, cleaning, walking the dog, childcare, and so on), see André Gorz, *Métamorphoses du travail. Critique de la raison économique* 251 (Galilée 1988).