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**TOWARDS SUSTAINABLE SOCIAL LAW: THE
AUTONOMY-PRIVATE LIFE NEXUS**
The protection of non-productive spaces within
working time regulation.

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ABSTRACT

Climate change's adverse impacts are not limited to the environmental effects but rather have a huge eco-social implication and a global, intersectional, and immediate response towards sustainable societies is required. We argue that this endeavour is part of a holistic change of paradigm where the development of a sustainable social law is crucial and where the principle of autonomy must be the cornerstone for its construction, in a venture to disentangle it from the productivist ideal and de-commodifying labour relations. Along the work we will propose some broad courses of action towards sustainable social law and will argue for the protection of non-productive spaces within the current legal system by reinstating the nexus autonomy-private life. To conclude, we will endeavour in a multilevel overview of the European and Spanish legal frameworks on working time, with the uncertainty to find any room for autonomy and, eventually evaluate the legal rationales that underly the legal frameworks, addressing its implications.

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PART ONE. JUST TRANSITION AND SUSTAINABLE LABOUR LAW: THE PROTECTION OF NON-PRODUCTIVE SPACES THROUGH AUTONOMY.

In the first part of this work, we will argue that a re-assessment of social law institutions is crucial when addressing the impacts of climate change, and the need to undertake normative action therefor, and to do it through a nuanced understanding of the principle of personal autonomy as a main rationale. The analysis will focus from a Eurocentric point of view and refer to developed economies' legal systems as a matter of global justice.

The first chapter will evaluate the role of social law within the productivist model and its key influence in climate change adverse impacts and will argue for an urgent need to reassess some of its very foundations that date from the industrial era. This endeavour is argued to be a part of a holistic change of paradigm that involves intersectional and global action. To this end, it will also analyse the European Union and United Nations proposed action for a sustainable transition to analyse whether it is suited to address the issue properly.

The second chapter will argue that a sustainable social law is necessary to address the just transition as a response to climate change adverse impacts. To this end, a definition is going to be proposed and some first courses of actions are going to be suggested, from a broader perspective, towards a more operational response within the current legal framework: the protection of non-productive spaces. Here, it will be argued that the principle of autonomy, understood from a relational positive conception, is key in both, the more operational action to protect non-productive spaces, and, more broadly, in developing a sustainable social law. It will be then argued that protection for non-productive spaces can be afforded through a broad interpretation of the right to private life 8 ECHR, as including the principle of personal autonomy.

Chapter 1. Sustainable development and just transition: what role for social rights?

1.1. Introduction. Ecological transition and labour law: a social justice challenge.

International social law was born anchored within the productivist paradigm of liberal societies. Political and economic liberalism strived for an ideal self-regulated society, where no vertical intervention was allowed under the principle of individual autonomy, understood broadly as rejecting any form of external interference. This society, was self-regulated by the exchanges in the market that allowed the satisfaction of every individual's need, being scarcity the major issue that could hamper social peace.¹ To respond to those needs, unlimited economic growth and productivity became a central objective.² This came hand in hand with the social tailoring of an unlimited development of needs, and therefore a consumption pattern defined by the unlimited (and unnecessary) consumption of goods, under the demand of strict immediacy.

In this context, labour law became the tool to vectorise the society needs, with the creation of a legal framework that protected “full productive work”³, as the best mean for a sustained production and economic growth. Thus, it was only considered as valuable and worth protecting the productive work exchanged within the market: the work-commodity. And this is the form of work that international social law took as a cornerstone when building a system of social fundamental rights, which remains a central element in the in-force international instruments.⁴ This way, social law contributes to perpetuating the productivist ideal, where well-being and prosperity of

¹ Elise Dermine and Daniel Dumont, ‘Le droit social et le productivisme. Droit de la croissance ou droit de l'autonomie? Une cartographie du rapport de forces’ in Antoine Bailleux (ed), *Le droit en transition. Les clés juridiques d'une prospérité sans croissance* (2020) 214.

² Antoine Bailleux and François Ost, ‘Six hypothèses à l'épreuve du paradigme croissanciel’ (2016) *Revue interdisciplinaire d'études juridiques* (2016) <<https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2016-2-page-27.htm>> accessed 24 February 2023.

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 6 and European Social Charter Revised (adopted 3 May 1996, entered into force 1 July 1999) (ESC) preamble.

⁴ International Labour Organisation ‘Decent Work’ <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> accessed 7 February 2023.

society depend on the unlimited production of wealth, achieved by means of a moral duty of citizens towards society, through “full productive work”. Under this notion of productive work and work-commodity, workers are conceived as economic units that produce value in the market, i.e., as tools for companies to remain competitive in a voracious market that does not understand from variables other than maximizing economic profit and growth. And it is this conception that has allowed for the political instrumentalization and subordination of social law on behalf of economic growth as the lighthouse for liberal-capitalist societies’ welfare.

This productivist paradigm has translated into a reckless exploitation of natural resources and overuse of the land, energy, natural resources, and waste generation. A change in the most basic physical processes of the Earth, exceeding its biologically regenerative capacities.⁵ Now, the adverse impacts of climate change are unquestionable, and the planet’s habitability is at stake. In a scenario framed by globalisation and extremely unequal societies, the impacts of a transformation in environmental terms might have deep social impacts, specially for the less favoured collectives. Thus, climate crisis calls for immediate, coordinated, global, and intersectional action. To effectively tackle the consequences of the climate crisis, we cannot solely place the attention on decarbonisation processes and rethinking the productive model, since its effects extend beyond the environmental-economic aspect, such as the raise of social inequalities, climate refugees, migration and forced labour or climate justice issues, amongst others.⁶

Therefore, any transition that aims to be effective to tackle climate change effects, must be three-folded: this is, concerned about environmental and economic aspects, but also focused on social justice and equity. In this sense, we can’t talk about an effective transition if it’s not just.⁷

⁵ Laura A. McKinney and Gregory M. Fulkerson, ‘Gender equality and climate justice: a cross-national analysis’ (2015) *Social Justice Research*, 297.

⁶ Carlos Taibo, *Decrecimiento. Una propuesta razonada*, (Alianza editorial 2021) 30.

⁷ Consuelo Chacartegui Jávega, ‘Transición justa con justicia social: por una sostenibilidad real y efectiva’ in *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021).

This way, the idea of “just transition” emerges in the international outlook: a process of transformation to net emissions and recovery of economies but placing the principle of equity in the centre. In this process, social law is a central field for two reasons: firstly, because of its role in the legitimacy and operability of the productive-economic model; and secondly, because of the multiple implications in the configuration and functioning of societies and in people’s livelihood and well-being, where the adverse impacts of globalisation and climate change are already felt: from job destruction and transformation; disruption of business activity and economic losses; precariousness at work; increased occupational health and safety risks; higher commodity prices and lower incomes of poor households; unprecedented raise of forced labour migration and informal economy, to the demands of re-skilling.⁸

In conclusion, a just transition towards a sustainable society implies setting as a cornerstone the questioning and re-thinking of social law institutions: firstly, because it has acted as a vehicle of the productivist-liberal paradigm,⁹ and secondly, because of its important role in social justice matters, in the redistribution of value within society and the impact on people’s livelihood and well-being.

Before moving on, we find convenient to note at this point that the term *social law* used herein refers to both labour and social security law¹⁰ as a discipline that promotes

⁸ International Labour Office Governing Body (329th session), ‘Addressing the impact of climate change on labour’ (Geneva, 9-24 March 2017; International Labour Organisation ‘Guidelines for a just transition towards environmentally sustainable economies and societies for all’ (ISBN 978-92-2-330627-4) (Geneva, 2015); Antonio Baylos Grau ‘Crisis y reconfiguración de la autonomía colectiva en el futuro del trabajo’ (El futuro del trabajo: 100 años de la OIT XXIX Congreso AEDTSS, Salamanca, May 2019).

⁹ We agree herein with Dermine’s approach to the matter: social law in its ambivalence, has hindered the de-commodification of work and the freeing from the productivist paradigm, although it has also contributed to tempering its mandates, containing some “deviant mechanisms” that are not nourishing the unlimited economic growth. As a matter of example, the possibility to suspend the performance of the contract, or the regulation of working time by granting some space-time outside work. See Elise Dermine, ‘Towards a sustainable social law: what role for legal scholars’ International journal of comparative labour law and industrial relations (forthcoming), 2.

¹⁰ Petr Tröster, ‘Labour and social security law as two related branches of the Czech law’ (2016) The Lawyer Quarterly; Rodolfo Sosa ‘Concepto y contenidos del Derecho Social’ (2016) https://www.trabajosocial.unlp.edu.ar/uploads/docs/conceptos_y_contenidos_de_la_seguridad_social.pdf accessed 23 May 2023.

social justice, collective welfare, and equality. Any reference herein solely to “labour law” pursues coherency, but always refers to it as a branch conforming social law.

1.2. The *European Green Deal* and ILO’s Decent Work Agenda: the role of social rights in a “new” paradigm.

The agendas of the main international organisations have shifted from the austerity-based measures that were seen during the last decades.¹¹ The European Union (hereinafter, “EU”) has conceived the ecologic transition as an opportunity to persist on economic growth decoupled from resource usage and focusing on the great potential of a new paradigm to create jobs.¹² The EU *Green Deal* strives for the latter to achieve zero net emissions by 2050 (and a 55% reduction by 2030) while “giving priority to the human dimension, (...) protecting citizens and workers more vulnerable to the transition”.¹³ The International Labour Organisation (ILO) and the United Nations (UN) take a similar approach through the Decent Work Agenda, the ILO Guidelines for a just transition or the 2030 Sustainable Development Goals: the “promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work”¹⁴ with a compromise towards social justice and human rights: reduction of poverty and inequalities, sustainable cities, zero hunger and clean water,¹⁵ or the promotion of a social and solidarity economy to “spread prosperity, opportunity and sustainability”.¹⁶

¹¹ Consuelo Chacartegui Jávega, ‘Transición justa con justicia social: por una sostenibilidad real y efectiva’ in *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021) 21.

¹² Communication from the Commission, ‘the European Green Deal’ COM (2019) 640 final.

¹³ Communication from the Commission, ‘the European Green Deal’ COM (2019) 640 final.

¹⁴ International Labour Organisation ‘Decent work and the 2030 Agenda for sustainable development’ <https://www.ilo.org/global/topics/sdg-2030/lang--en/index.htm> accessed 7 February 2023; International Labour Organisation ‘Decent Work’ <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> accessed 7 February 2023.

¹⁵ International Labour Organisation ‘Decent Work’ <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> accessed 7 February 2023; International Labour Organisation ‘Guidelines for a just transition towards environmentally sustainable economies and societies for all’ (ISBN 978-92-2-330627-4) (Geneva, 2015).

¹⁶ International Labour Organisation ‘ILO welcomes new UN resolution on social and solidarity economy’ https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_877429/lang--en/index.htm accessed 10 February 2023.

The threefold intersectional action of the international organisations -economic, environmental, and social- is very promising. However, some aspects of the so-called *green deal* approach of the international organisations, might impair an actual and effective just transition in the terms that we stated above:

Firstly, there is a considerable risk that all international agendas postulates are reduced to a mere shift to greening economies and green production to tackle climate change. This *green deal* approach might imply that, due to the urgency of the objectives to accomplish, the requirements of equity and respect of fundamental social rights are subordinated to the most imperative ones: the zero net emissions. And here, excuses on the need to prioritise economic sustained growth and competitiveness over the development of social rights agenda, might be easily alleged.

Secondly, this proposed “green economies”¹⁷ are built upon the productive work and unlimited sustained economic growth rationale, as a paradigm of liberal welfare societies. Therefore, they do not intend to break with GDP-growth and productivity logics but actively foster ecological modernisation¹⁸ and pre-existing consumption patterns. Hence, the *green deal* economic approach can be partially opposed to a genuine intersectional action, since GDP is not an indicator that expresses the well-being of a society anymore,¹⁹ and does not allow a re-thinking of both the productive model and the social law institutions. Instead, we argue that the EU, UN and ILO should put the focus on a well-being and equity-oriented economy, where development is disentangled from GDP-growth and scaling productivity-consumption patterns,²⁰ compatible with the social justice postulates to achieve a just transition towards a sustainable society.

Another element that supports the aforesaid is the approach of the international agenda to the just transition as instrumentalising labour law for employment policy

¹⁷ Carlos Taibo, *Decrecimiento. Una propuesta razonada*, (Alianza editorial 2021)

¹⁸ Max Koch and Oluf Langhelle, ‘Why ecological modernization and sustainable development should not be conflated’ (2000) *Journal of Environmental Policy and Planning*, 303.

¹⁹ Milena Büchs and Max Koch, *Postgrowth and Wellbeing: Challenges to Sustainable Welfare* (Palgrave 2017), 39; Timothée Parrique, *Ralentir ou périr. L’économie de la décroissance* (Seuil 2022).

²⁰ Elise Dermine, ‘Towards a sustainable social law: what role for legal scholars’ *International journal of comparative labour law and industrial relations* (forthcoming), 3.

reasons. Green economies are valued because of their capacity to become a “new engine of growth and a net generator of *green jobs*”²¹ in an economy that must “be competitive” with “improved productivity.”²² Therefore, given the right time, as pointed out before, excuses on the need to keep competitiveness and production can be raised to justify the creation of millions of *green jobs* and relegate social law to the “law to of the employment”, i.e., instrumentalised and deregulated to act as a machine for the creation of productive employment.²³ In the same vein, how are these green jobs supposed to be “decent”, tackle inequalities and poverty, in compliance with the ILO or EU agendas? Far from a magic formula, the evidence points out that the implementation of green jobs would adapt to the current model, i.e., to the growing tendency towards flexibility mechanisms and non-standard forms of employment. The latter have been intrinsically related to perpetuating precariousness²⁴ due to its uncertainty and lack of permanency, limited access to social benefits and statutory entitlements, income insufficiency, increased vulnerability towards the employer and higher risks on occupational health and safety.²⁵ In any case, if *decent green jobs* were suitable to confront the productive model or to tackle precariousness, inequalities, and poverty, it is odd that they have not been pursued before, but instead precarious non-standard forms of employment are an upward trend.

These contradictions, that the reader must have noticed, on the international actor’s roadmap are mostly explained by social law embedment within the productivist ideology

²¹ International Labour Organisation ‘Guidelines for a just transition towards environmentally sustainable economies and societies for all’ (ISBN 978-92-2-330627-4) (Geneva, 2015).

²² International Labour Organisation ‘Guidelines for a just transition towards environmentally sustainable economies and societies for all’ (ISBN 978-92-2-330627-4) (Geneva, 2015) 1-6.

²³ Joaquín Pérez Rey and Antonio Baylos Grau, *El Despido o la violencia del poder privado*, (Madrid, Trotta 2009) 35.

²⁴ As acknowledged by many ILO State Parties. See International Labour Office Governing Body (323rd session), ‘Conclusions of the ILO Meeting of Experts on Non-Standard Forms of Employment (Geneva, March 2017) 12-26.

²⁵ Marcelo Amable, Joan Benach and S. González, ‘Precariedad laboral y su repercusión sobre la salud: conceptos y resultados preliminares de un estudio multimétodos’ (2001) Archivos de Prevención de Riesgos Laborales, 169; Wayne Lewchuk, Alice de Wolf et al. ‘From job strain to employment strain: health effects of precarious employment’ (2003) *Just Labour: a Canadian Journal of Work and Society*, 23; Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 133.

and its instrumentalization for economic purposes. And certainly, they imply a hindrance for the real effectiveness of a just transition: firstly, because of a high risk of subediting the social mandates of the just transition to the economic ones, stopping social law from their social justice goals, such as the redistribution of value, the well-being and free spiritual development, economic security, equality of opportunities or social protection for life in dignity.²⁶ And, secondly, due to the lack of re-assessment of the productive paradigm and of the notion of work-commodity, allowing for a perpetuation of the notion of “full productive work” and the ideas of sustained economic growth, what directly hampers even the most obvious net emissions goals.

To sum up, an effective just transition cannot be merely approached from a single objective associated with economic growth, productivity, and employment policy reasons. Sustainable development and a just transition as a new paradigm of normative action, must rethink and reassess social law institutions as a necessary condition to tackle the climate change adverse impacts, by incorporating into the debate firstly, the integration of social justice and equity (and not subordinating them to the binomial climate neutrality-economic growth) and, secondly, the disentanglement of social law from the productive paradigm and the notion of work(er)-commodity.

It remains to be seen whether the postulates of the international organisations’ agenda will progressively become an institutionalisation of *greenwashing* and a crystallisation of the productivist paradigm, the endless economic growth and inequality-based societies, or an actual deep, effective transformation that lives up to the expectations: a just transition.

²⁶ International Labour Organisation General Conference (26th session), ‘Declaration concerning the aims and purposes of the International Labour Organisation’ (10 May 1994).

Chapter 2. Sustainable labour law and welfare at work: (re)enhancing autonomy.

2.1. Towards a collective notion of sustainable work(er) and sustainable labour law

So far, we have seen that a just transition calls for a deep change in the economic and productive rationales to meet the environmental and social justice challenges and how important is the role of social law thereto. However, that outcome is unlikely -less it be shifting towards a degrowth economic model- since the international agenda is still far away from leaving the productivist ideal behind and placing well-being and decent living standards as a cornerstone. Either way, as it has been exposed, the rethinking of social law to those ends is necessary, i.e., the need to talk about a *sustainable social law*.

The term *sustainable labour* or *social law* has not been commonly used. The categorisation of work has been very much limited to the concepts “green” or “decent”,²⁷ but not frequently qualified as “sustainable”, which usually goes paired with notions of economic development.²⁸ We disagree here with the definition proposed by the European Foundation for the Improvement of Living and Working Conditions on what sustainable work should be. It focuses on the importance of “engaging and keep workers in the workforce throughout an extended working life” or “concerns about the sustainability of pensions and economic growth”, by “helping people to stay in charge of their own life for as long as possible (...) to contribute to the economy and society”.²⁹ The definition is embedded to the core with the productivist ideals and endangers a *greenwashing* outcome, valuing individuals mostly for their capacity to generate economic value, as productive assets.

²⁷ Communication from the Commission, ‘the European Green Deal’ COM (2019) 640 final; International Labour Organisation ‘Decent work and the 2030 Agenda for sustainable development’ <https://www.ilo.org/global/topics/sdg-2030/lang--en/index.htm> accessed 7 February 2023.

²⁸ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021).

²⁹ Sustainable Work, Eurofound (2014) <https://www.eurofound.europa.eu/topic/sustainable-work> Accessed November 2009. Accessed 24 May 2023.

Conversely, we believe that “sustainable social law” must seek to vector the just transition purposes stated above. To that end, we propose here a definition of the concept that stems from the strict sense of “sustainability”: the need to be “sustained over a long period of time without depleting resources or causing serious damage to the environment”³⁰ but that goes beyond that and seeks to support a change of the productive paradigm, the de-commodification of work(ers), and to work towards social justice and equity objectives, to properly address the adverse impacts of climate change.

Hence, we propose the following non-exhaustive first courses of action to revise social law for it to achieve the condition of sustainable, in the terms we defined above: the promotion of a public-social notion of work; a shift from the traditional protection of health and safety towards a broader notion of “welfare at work”; a reinterpretation of the right to work to include non-productive spaces and non-productive forms of work and a redistributive social security system that guarantees income security.

2.1.1. Promoting a public-social notion of work

A first step towards sustainable social law is the recognition of what we call herein a *public-social notion of work* and articulate a system of guarantees around it. Traditionally, work has been contemplated as a relation that takes place in a private-contractual sphere, inside the organisational prerogatives of the employer; until very recently this notion was graphically described by workplace as a physical space where -only- work occurs during a specific time. This working space-time has been conceived as a space of conflict where interests of both parties in an asymmetric relation are at stake and therefore a system of guarantees was built upon.³¹

A sustainable labour law that aims for de-commodification and breaking with the productive ideal demands the recognition of a broader nature of work. A notion linked

³⁰ Real Academia Española, *Diccionario de la Lengua Española* <https://dle.rae.es/contenido/cita> accessed 6 June 2023.

³¹ Simon Muntaner, ‘Trabajo y empleo en el marco de estrategias eco sociales de transición’ (*Según Antonio Baylos, 2014*) <https://baylos.blogspot.com/2014/08/trabajo-y-empleo-en-el-marco-de.html> accessed 24 May.

to the private-public existence of workers, their living conditions, their personal processes, and their social reproduction.³² Thus, this notion of *public-social work* that we refer to, implies the acknowledgment of work as a “public, social, political phenomenon”³³ that is fundamental in terms of redistribution of value within society and in determining the social status, i.e., the inclusion within the social sphere and the participation in social relations as a citizen,³⁴ which is strictly link to the enjoyment of human rights in autonomy, such as the right to private life, self-fulfilment or the free development of personality.³⁵ Within this conception of labour, work is an essential element for the development of his personal life and social development. Thus, they shall be accordingly treated as results, instead of as means, i.e., they matter as individuals and they deserve protection based on their existence in dignity, instead of as productive assets with skills to generate economic value. To that end, it is crucial the role of autonomy as means to attribute value and protect it; we will deeply focus on it on the next chapter.

However, the adoption of such a notion of work is almost unthinkable in the current social scenario. The social contract that once connected work-citizenry and articulated an income distributional agreement has been progressively substituted by processes of individualisation, and privatisation of social goods, services, and spaces³⁶ after the economic crisis and the austerity measures. From then, concepts like citizenry, community and fraternity are less present than ever in people’s life regardless the global interconnection. Labour law suffers a de-institutionalisation process under the banner of individuality, freedom, and post-modernist postulates, as part of a programme that

³² Simon Muntaner, ‘Trabajo y empleo en el marco de estrategias eco sociales de transición’ (*Según Antonio Baylos, 2014*) <https://baylos.blogspot.com/2014/08/trabajo-y-empleo-en-el-marco-de.html> accessed 24 May.

³³ Antonio Baylos Grau, ‘Regulación del trabajo, valores sociales y nuevas figuras laborales’ (2020) *Gaceta Sindical: reflexión y debate*, 118.

³⁴ Josep Vicent Saragossà, ‘El discurso oficial de la precariedad laboral. Aproximación a las exposiciones de motivos de las reformas laborales en torno a la precariedad’ in Vanessa Cordero Gordillo (ed) *Temporalidad y precariedad del trabajo asalariado: ¿el fin de la estabilidad laboral?* (Bomarzo, 2020).

³⁵ María Teresa Igartua Miró, and Antonio Ojeda Avilés. ‘La dignidad del trabajador en la doctrina del Tribunal Constitucional. Algunos apuntes’ (2008) *Revista del Ministerio de Trabajo y Asuntos sociales* 147.

³⁶ Antonio Baylos Grau, ‘El futuro de las normas de trabajo que queremos’ (2017) *Cuaderno Jurídico y Político, Volumen 3, Número 10*, 53.

tries to re-legitimise the decisive function of the market, which has been proven to have adverse effects on workers.³⁷ Isolating individuals from collective spaces and collective protection or encouraging them to conduct their own businesses, under the excuse of moral claims to conduct each one's life and self-fulfilment, pushing them away from labour law traditional guarantees, transforming it to the "law of the employment"³⁸, i.e., a machinery to generate millions of precarious flexible jobs without security. In turn, an ideal scenario for a flexibility culture that isolates workers from collective protection mechanisms, perpetuates precariousness and reduces costs at the expense of commodified workers. Paradoxically, companies do have made use of their capacity to engage in partnerships, transnational trade agreements or economic lobbies, getting control of services that were once public and pushing back the state's influence and ability to protect citizens, hardly unable to temper the market's mandate anymore. Consequently, these processes have brought notable effects: firstly, on devaluating individual and collective rights at work, helping to its re-commodification;³⁹ secondly on increasing social inequalities while isolating individuals from any collective identity or community belonging, hampering any forms of social cooperation and thirdly, shifting the normative control from states to private companies, even in human rights violations.⁴⁰

Adopting this public-social notion of work calls for a reversion of this processes. Here, a proactive position is needed: the more down on this individualisation and de-regularisation processes are, the more deteriorated the link work-citizenry is, and the harder it is for individuals to have influence to revert the situation and protect their position *vis-à-vis* the employer.

³⁷ Antonio Baylos Grau, 'Regulación del trabajo, valores sociales y nuevas figuras laborales' (2020) *Gaceta Sindical: reflexión y debate*, 126.

³⁸ Joaquín Pérez Rey and Antonio Baylos Grau, *El Despido o la violencia del poder privado*, (Madrid, Trotta 2009), 35.

³⁹ Antonio Baylos Grau, 'Regulación del trabajo, valores sociales y nuevas figuras laborales' (2020) *Gaceta Sindical: reflexión y debate*, 128.

⁴⁰ Antoine Duval, 'Ruggie's Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence' (2023) *Nordic Journal of Human Rights*.

Hence, work cannot merely be conceived and protected as a private matter that takes place in certain physical spaces during a specific time, where the conditions of their development are set by an individual negotiation between employer-employee and where the only element to temper the unbalanced relation is a limited collective bargaining structure which powers are being slowly drained. Conversely, a sustainable labour law must re-enhance the public-social dimension of work, reinstating the nexus work-citizenry and guaranteeing workers dignity, autonomy, and well-being by recognising the importance of work for their personal development, their social reproduction, and the development of their personal processes within the community.⁴¹ While, in turn, tackling the individualisation and isolation processes. We shall see in the next section an idea that needs to be developed hand in hand with this notion to actively tackle the work-commodity and the productivist ideal.

2.1.2. From health and safety to welfare at work: “sustainable development of workers”.

The integration of the environmental and social perspective within labour relations demands, as we have seen above, the defence of work as a public-citizen space rather than a private-contractual one. This public dimension of work requires to make an abstraction and look from the distance at how social law operates. By not acknowledging the importance of the public notion of work, social law has been protecting workers within the boundaries of a private-contractual space or -until very recently- the physical space that defined work. As a matter of example, some of the ILO Conventions regarding occupational health and safety are designed to protect the worker from the perspective of “how” work is developed, i.e., during a specific time where work is undertaken, in a specific place(s), and from hazards linked to the undertaking of work itself. It is very illustrative in some cases: in *in itinere* occupational accidents, the protection is given to workers because the commuting process is considered as it happened at work or the need to establish a causal link between the development of a disease and the undertaking

⁴¹ Consuelo Chacartegui Jávega, ‘Transición justa con justicia social: por una sostenibilidad real y efectiva’ in *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021)

of work for it to be considered as occupational and receive further protection.⁴² Nonetheless, this notion is slowly being left behind, and the recognition of work effects beyond a physical space(s) or time is progressively moving onwards. For example, in Spain, by broadening the protection of occupational diseases further than employees, or a “solid culture of prevention with an active role of collective bargaining”.⁴³ However, this progress it’s still not relevant enough to articulate a movement against the productive rationale and the commodification of work.

Hence, sustainable social law should re-assess the standard-setting perspective, shifting the criteria from “how” work is undertaken towards “who” undertakes work. This would allow a more operational response, by valuing the well-being of individuals, this is, placing the welfare at work as a pillar principle in standard-setting, granting a “sustainable development of workers”.⁴⁴ Where, as an opposite concept, “ill-being” refers to long working hours, insecurity of income, mental health issues, lack of autonomy, problems with conciliation, lack of fulfilment and self-realisation... Here, standards such as decent livelihood, self-realisation, increased creativity, or the “waste of human potential”,⁴⁵ should be taken as indicators to evaluate the sustainable development of workers and their well-being, far from any productivity-growth rationale and from a normative action shaped within the boundaries of that binomial.

In turn, this shift could have some collateral effects on the role of public authorities and the intensity of state obligations. In Spain, for instance, through art. 40 of the Constitution,⁴⁶ public authorities have a duty to safeguard “health and safety at work”. By shifting from this rationale towards “welfare at work”, public authorities would have to protect not only the strict notion of health and safety, but the overall well-being of

⁴² Sentencia del Tribunal Supremo 437/2023 (Sala de lo Social, Sección 1) 9 February 2023 (appeal 2617/2019), FJ 2.

⁴³ Simon Muntaner, ‘Trabajo y empleo en el marco de estrategias eco sociales de transición’ (Según Antonio Baylos, 2014) <https://baylos.blogspot.com/2014/08/trabajo-y-empleo-en-el-marco-de.html> accessed 24 May.

⁴⁴ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 96.

⁴⁵ Nicolas Bueno, ‘From the Right to Work to Freedom from Work’ (2021) *Journal of Human Development and Capabilities* 23, 469.

⁴⁶ Constitución Española (BOE No 311, 29 December 1978).

workers, broadly understood from a public-social notion of work, i.e., not limited to the working time or a physical space, extending a broader social sphere. However unlikely it is a further involvement of states within the sustainable development of workers, it would at least legitimize public authorities with operational options: functionalise companies' interest to eco-socially relevant objectives; to actively promote tripartite commissions for the development of workers welfare policies, or even to control the adverse impacts of a companies' production. And here, to do it firstly because of its impact in the environment and their obligation to protect and preserve it and secondly, because of its direct adverse impact on individuals' welfare as a matter of their sustainable development and the role that the environment plays thereto.⁴⁷

In fact, it's something that could already be fit within ILO's Decent Work Agenda and its founding principles. For instance, in a document drafted for its centenary in 2019, work was recognised as "crucial to a person's dignity, well-being and development as a human being",⁴⁸ and international labour standards as "mechanisms to ensure that economic development remains focused on improving the life and dignity of workers"⁴⁹. Instead, by supporting the need for sustained economic growth and its instrumentalization for the creation of full productive jobs, they currently allow for a development of social law discipline that works the other way around: workers life revolves around improving productivity and economic growth in a flexibility and precariousness framework where they mostly matter as capital that produce economic value.⁵⁰

⁴⁷ Simon Muntaner, 'Trabajo y empleo en el marco de estrategias eco sociales de transición' (*Según Antonio Baylos, 2014*) <https://baylos.blogspot.com/2014/08/trabajo-y-empleo-en-el-marco-de.html> accessed 24 May.

⁴⁸ International Labour Office 'Rules of the game: An introduction to the standards-related work of the International Labour Organization' (Geneva, 2019) 13.

⁴⁹ Nicolas Bueno, 'From the Right to Work to Freedom from Work' (2021) *Journal of Human Development and Capabilities*, 477.

⁵⁰ Nicolas Bueno, 'From the Right to Work to Freedom from Work' (2021) *Journal of Human Development and Capabilities*, 476.

2.1.3. From a right to productive work as source of income to the protection of non-productive work and spaces

Another key element to aim for de-commodification of work and tackling the productivist paradigm, would be the re-understanding of the right to work and of its scope, i.e., the activities it protects.

We have seen the relevance for a sustainable labour law to recognise a public-social notion of work linked to the personal development and “human flourishing”⁵¹ of individuals, their self-realisation and fulfilment, and the importance of re-shifting the perspective of the normative action to place well-being in the centre, instead of productivity-growth criteria.

Besides those conceptions, the right to work, *de facto*, is “instrumentally valuable as a source of income”,⁵² which is probably considered as the most important aspect of labour for most people, as an expression of the reduction of work to a commodities trade in the labour market. Work is currently understood as the right to have a chance to earn a living through a freely accepted work, not necessarily a freely chosen one.⁵³ This commodified understanding of work and the protection along the international legal framework of the full-productive work, entails firstly, that states must devote their machinery to achieve a “full productive employment” to the best of their available resources and under a progressive realisation mandate,⁵⁴ as a central element to work towards their objectives of sustained production and increased growth, far from the notions discussed in the last sections. And secondly, that workers are pushed to work for economic security and decent livelihood and doing so in a not necessarily freely chosen one.

⁵¹ Vicki Schultz, ‘Life’s Work’ (2000) Columbia Law Review Volume 100, Contributing to human flourishing or devastation.

⁵² Nicolas Bueno, ‘From the Right to Work to Freedom from Work’ (2021) Journal of Human Development and Capabilities, 464.

⁵³ Nicolas Bueno, ‘From the Right to Work to Freedom from Work’ (2021) Journal of Human Development and Capabilities, 475.

⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Agatha Hauser ‘Economic Social and Cultural Rights’ *Power Point presentation, European Master’s Programme in Human Rights and Democratisation* (Venice, 2022).

This classic conception of work would not fit with the shift towards welfare at work that we discussed in the previous section; in fact, the need to work for a security income in an unwanted job (with a very limited autonomy, low rates of self-fulfilment, instrumentalized for production matters, long working hours...) would be a potential source of ill-being. Within this understanding of work, “many workers fail to provide valuable goods through working, or their working does not result in net social benefit”⁵⁵ and “many workers do not receive adequate benefits from working in that they neither have their basic needs met or do not even enjoy an improvement in welfare thanks to working”.⁵⁶

Instead, a shift is required from understanding work as a source of income for a decent livelihood, i.e., moving from productive work as a need for a living, towards productive work as one of the ways to contribute to societies welfare. For this, it would be needed a social security system that, firstly, provides with security of income detached from work and to grant a decent livelihood; and secondly, that allows to discharge public authorities with the need to invest in generating more work opportunities (quantitatively), to allow to an increased widespan of activities that are considered as protected by social law (qualitatively).

Hand in hand to the latter, as a necessary consequence, sustainable social law must promote and defend non-productive activities and spaces, as an expression of the valorisation of forms of work other than labour exchanged in the market for a price. By “non-productivist time spaces”⁵⁷ we take Dermine’s concept of “those time-spaces that are not geared towards economic growth, since they don’t necessarily provide with an economic value in the productive sense of the word, or at least not an immediate one”.⁵⁸ Therefore, activities and time spaces that are not contributing to GDP but instead they

⁵⁵ Michael Cholbi, ‘The Duty to Work’ (2018) *Ethical Theory and Moral Practice*, 1,119.

⁵⁶ Michael Cholbi, ‘The Duty to Work’ (2018) *Ethical Theory and Moral Practice*, 1,119.

⁵⁷ Elise Dermine, ‘Towards a sustainable social law: what role for legal scholars’ *International journal of comparative labour law and industrial relations* (forthcoming); Geoff A Wilson ‘From Productivism to Post-Productivism ... and Back Again? Exploring the (Un)changed Natural and Mental Landscapes of European Agriculture’ (2001) *Transactions of the Institute of British Geographers*.

⁵⁸ Elise Dermine, ‘Towards a sustainable social law: what role for legal scholars’ *International journal of comparative labour law and industrial relations* (forthcoming), 7.

generate another source of value, such as ecological, social, or personal value that contributes to the overall well-being.⁵⁹ This, in turn, would allow a wide range of activities protected by social law where workers could devote themselves and contribute to a society that revolves around the protection of their well-being. The recognition of this productive spaces would also have a massive effect in tempering the unbalanced relationship with the employer, the productivist mandates and the commodification of work: firstly, by allowing the worker to prioritise the undertaking of these activities or spaces before the productive work - which implies either the lack of involvement in producing or a lower quantitative involvement; secondly, because they value other forms of work than the work-commodity; and thirdly because economical and organisational interests of the employer would not necessarily outweigh the employee's interest, and therefore, the right to the non-productive spaces or activities. We can already envisage the importance that the autonomy of individuals is going to play thereto.

These forms of work, or the granting of such spaces within productive work would not go against the development of the public-social notion of work and the expressive function. Quite the opposite, this new conception of work would still operate as a (more) wholesome environment to socially develop, and where people genuinely undertake different socially useful activities within society, while building a community culture.

2.1.4. A safety floor: security of income.

As we have already discussed, a social security system is key to protect this sustainable social law development, and for a solidarity culture that reverts the wealth generated in benefit of the community in an equal and distributive manner.

In this sense, social security, as we stated should provide with a security of income and adequate living standard.⁶⁰ This would allow everyone, in equal opportunity, to take

⁵⁹ Jesús Galiana Moreno, 'Autonomía colectiva y autonomía individual en la regulación de las condiciones de trabajo' (2007) Revista del Ministerio de Trabajo e Inmigración, 68.

⁶⁰ Simon Muntaner, 'El Futuro del Trabajo que queremos: un debate global que resume Jaime Cabeza' (Según Antonio Baylos, 2019) <https://baylos.blogspot.com/2019/04/el-futuro-del-trabajo-que-queremos-un.html> accessed 15 June.

a leave or to reduce its working hours to commit to a personal project that can have utility eco-socially speaking, or that can rearrange their distribution of work without being outweighed by economic, organization and technical reasons alleged by the employer; in turn, to focus on their well-being while contributing actively to society. Or, in a broader sense, an economic universal protection that allows a freedom from productive work,⁶¹ allowing for the genuine, free undertaking of non-productive activities. In turn, a key aspect for granting individual's autonomy as an essential element for the de-commodification of labour, i.e., the disconnection of income from the exchange value in the labour market.⁶²

As we have seen, this is a deep transformation that social law can't embrace alone, and a coordinated, global intersectional actions is required. But, by keeping this aims, sustainable social law as herein defined, would not only actively contribute to the de-commodification of work and the freeing from the productivist ideal but would set a solid framework for a "sustainable society" based on the "principle of community and social fraternity",⁶³ i.e., a society that is dedicated to real and effective equality and well-being of its members, who are collectively dedicated to those ends through their individual compromises. Where each individual acknowledges the importance of every other individual's well-being and does not act merely to receive something in exchange or instrumentally, but from the social justice mandate that binds all the individuals living together. Or, at least, for now, it could become a cornerstone in tempering both the productivist mandate and the prevalence of economic interests and competitiveness

⁶¹ Simon Muntaner, 'El Futuro del Trabajo que queremos: un debate global que resume Jaime Cabeza' (Según Antonio Baylos, 2019) <https://baylos.blogspot.com/2019/04/el-futuro-del-trabajo-que-queremos-un.html> accessed 15 June.

⁶² Elise Dermine and Daniel Dumont, 'Le droit social et le productivisme. Droit de la croissance ou droit de l'autonomie? Une cartographie du rapport de forces' in Antoine Bailleux (ed), *Le droit en transition. Les clés juridiques d'une prospérité sans croissance* (2020) 262.

⁶³ Pilar Charro Baena, 'La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa' in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021); Consuelo Chacartegui Jávega, 'Transición justa con justicia social: por una sostenibilidad real y efectiva' in *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 26.

over social rights. And certainly, doing so in a much more effective way than its ambivalence allows now, seeking to institutionalise more “deviant mechanisms”.⁶⁴

2.2. (Re)enhancing autonomy: a cornerstone for sustainable social law.

The last section pointed to some courses of action that contribute to a more comprehensive understanding of sustainable social law and its importance in the just transition. It is certainly a titanic endeavour that social law can’t embrace alone with the urgency that the just transition requires. Nonetheless, we believe that social law can already and by itself build an operational response within the current legal framework.

We argue in this section that social law must devote to the protection of non-productive spaces and to do it through individual autonomy. This principle, we believe, it’s underlying in all the proposed actions above, and can endorse legal value to emancipatory claims from the condition of commodity and the productivist ideal and set positive obligations to states *as per* art. 8 ECHR.⁶⁵

2.2.1. Outlining an operational response: the protection of non-productive spaces.

We have argued before that the protection of non-productive spaces contributes to relativising the productivist ideal, de-commodifying the notion of work and tempering the unbalanced relationship with the employer. We believe that the protection of this spaces is the easiest operational response for social law within the current legal framework because it already contains mechanisms to relativise the productivist mandates: social security protection schemes (subsidies in the non-market sector), exceptions from job-seeking), remuneration to workers of civil service, working time regulations that free up time for rest and cultural or leisure activities (through leaves,

⁶⁴ Dermine refers to the concept as those mechanisms contained already by social law, at its margins, that relativize and challenge the productivist ideology. See Elise Dermine, ‘Towards a sustainable social law: what role for legal scholars’ *International journal of comparative labour law and industrial relations* (forthcoming), 6.

⁶⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

reductions of working hours...) or to take care of relatives.⁶⁶ Nonetheless, as we will see in the second part of this work, these mechanisms that grant non-productive spaces are adopted detached from a common purpose (like building a sustainable social law), which hampers their strength to challenge the productivist paradigm. Also, they are adopted from different rationales, some of these are questionable to tackle productivism, or easily pervertible: as a matter of example, some working time regulations that allow for non-productive spaces are based on the need to protect workers health, which can easily be subjugated to productive reasons, i.e., protecting health of workers as economic assets that need to stay healthy to produce at high rates. We will focus on this on the next part of this work.

Conversely, we propose that social law must endeavour normative action using the principle of autonomy as a rationale, since it's a common underlying principle in the development of sustainable labour law. We can briefly point its relevance within the actions proposed in the last section: firstly, because relational autonomy requires a wholesome network of relationships and socialisation to properly develop, what coordinates well with fostering a public-social notion of work; secondly, by promoting autonomy, one's interests and priorities would be considered as valuable, then it can be justified a turn on the normative action towards individual's well-being and to a sustainable development of workers; thirdly because autonomy calls for a freely chosen work and for a personal development that work as currently understood can hamper; and fourthly, because an economic security income is demanded by autonomy's genuine and effective exercise.

Consequently, social law must devote to the protection of non-productive spaces. But we believe here that it is a *conditio sine qua non* that it takes as legal ground the principle of individual autonomy, that must operate as a lighthouse for the normative action. This way it would grant an operational response now that, subsequently, could

⁶⁶ Elise Dermine and Daniel Dumont, 'Le droit social et le productivisme. Droit de la croissance ou droit de l'autonomie? Une cartographie du rapport de forces' in Antoine Bailleux (ed), *Le droit en transition. Les clés juridiques d'une prospérité sans croissance* (2020) 255.

fit in a multidimensional, coordinated normative action that seeks to work towards sustainable social law as defined in the previous section.

To that end it is necessary to focus on the concept of autonomy that we acknowledge as relevant for this work, and to analyse whether it can provide with an adequate legal protection to non-productive spaces.

2.2.2. The liberal conception of autonomy and negative freedom.

The liberalist society revolved around the notion of individuality. Human beings were conceived as independent individually developing entities in a society that self-regulated through the satisfaction of individual needs. The latter were developed by an inner critical thinking process that rejected any form of external interference and expressed their free will: individual autonomy.

They conceived autonomy as the ability to live according to a self-made life-plan⁶⁷, tailored by independent decisions made through a critical reflection process, that allowed no external influence and that takes place in a “private inner citadel”⁶⁸. This perception revolves around the notions of individuality and independence and portrays autonomy as an internal and isolated process that is valuable in itself.⁶⁹ In fact, it is based in the concept of negative freedom, i.e., freedom as non-interference, as a pre-condition for acting autonomously. Therefore, any action that is consequence of a decision made through this critical thinking process based on personal considerations, preferences, and volitions, without interference, can be considered as autonomous,⁷⁰ i.e., the individual has capacity to act autonomously.

⁶⁷ Jaunius Gumbis, Vytaute Bacianskaite and Jurgita Randakeviciute, ‘Do Human Rights Guarantee Autonomy?’ (2008) Cuadernos de la Cátedra Fadrique Furió Ceriol 77.

⁶⁸ Yael Braudo-Bahat, ‘Towards a Relational Conceptualization of the Right to Personal Autonomy’ (2017) 25 Am U J Gender Soc Pol’y & L 111, 122.

⁶⁹ Yael Braudo-Bahat, ‘Towards a Relational Conceptualization of the Right to Personal Autonomy’ (2017) 25 Am U J Gender Soc Pol’y & L 111, 122.

⁷⁰ Martin Diego Farrell, ‘Libertad negativa y libertad positiva’ (1989) Revista del Centro de Estudios Constitucionales 2, 9.

However, this conception faces some problems when addressing two relevant factors within the autonomous reflection: socialisation and the impact of socio-economic status. Firstly, it bases the understanding of autonomy on a partial conception of personhood, by omitting socialisation, what infringes autonomy instead of promoting it. Socialisation is an undeniable reality for individuals living in community, a process that contributes to one's self-development. The assumption that each person can simply examine her socialization and its consequences and free from it when undertaking a critical reflection process, overlooks the relevance of socialisation in the construction of personhood⁷¹ and in personality development. In fact, as we shall see later, autonomy requires of socialisation for its adequate development and exercise. Secondly, the liberal approach does not address properly the situation of underprivileged and marginalised groups, that hold a different socio-economic status within society. The latter suffer from lack of adequate material resources or inadequate livelihoods, which implies that they invest their emotional efforts in surviving and fulfilling their basic needs and of their families, being less able to conduct any reflective process⁷²; moreover, they lack a fair number of practicable alternatives to conduct an autonomous reflection or resources to *de facto* transform them into autonomous actions. As a result, they are left alone to deal with the adverse impacts of their social status and their lack of resources.

Under this individualist liberal notion of autonomy, an individual's course of action would be autonomous when not expressly prohibited and not expressly coerced, what could lead to justify and consider as autonomous decisions situations where: a worker accepted to perform work during their vacations; accepted a harmful job or took economic compensation to work unlimited overtime. In any case, it can contribute to the institutionalisation of the myth of the free choice, which for example, has been debated around the legitimation of the prostitution of unprivileged women when not expressly forced to,⁷³ also considered an autonomous legitimate decision, without bearing in mind the influence in the decision-making process, of the lack of resources or

⁷¹ Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 Am U J Gender Soc Pol'y & L 111, 122.

⁷² Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 Am U J Gender Soc Pol'y & L 128.

⁷³ Ana de Miguel, *Neoliberalismo sexual: el mito de la libre elección* (Feminismos, 2016).

inadequate living standards. In contrary, it could lead to consider as an autonomous and legitimate decision to take a sick leave when the decision was assessed by a trade union's representative, or when quitting a harmful job under a therapist advice.

This individualistic and independent conception of autonomy is used as a banner for the processes of collective de-institutionalisation that we referred above, that are having a harmful impact on collective bargaining and the protection of social rights, by alienating the worker from social dialogue and labour protection. Furthermore, it is a conception that allows to reinforce the commodified notion of the worker and the productivist imperative, i.e., conceiving workers as economic capital to produce value, by legitimising an "autonomy to produce". We will deepen in this concept in the second part of this work, but we refer to the use of this liberal conception of autonomy to justify decisions or actions taken by underprivileged individuals geared towards productivity or re-commodification, i.e., a bogus autonomy. This, in combination with the collective de-institutionalisation and individualisation processes, draws a scenario defined by a lack of effective protection and enjoyment of social rights, certainly not suitable to defend our conception of sustainable social law.

To overcome the contradictions that liberal conception of autonomy faces, and its instrumentalization for productive reasons, we defend a relational conception of autonomy.

2.2.3. Relational positive autonomy: de-commodifying labour law.

We have argued that a liberal conception is insufficient to serve as a principle to challenge the productivist paradigm. We defend here a relational concept of autonomy based in the positive freedom notion.

The relational concept understands autonomy as a dynamic and fluid process, as a synergy between individuality and interconnectedness of persons.⁷⁴ This way, human

⁷⁴ Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 Am U J Gender Soc Pol'y & L, 111.

beings develop their individual autonomy and undertake autonomous actions by learning and being influenced from others' decisions, preferences, or choices. This conception of autonomy does not contradict individuality but understands persons as embedded within relationships and at the same time distinct from each other: independent and interdependent, i.e., autonomy relies on social relations (society, work, state...) and the belonging to a community. This way, one cannot just choose his self-law but "formulate it through a constant understanding of social relations and personal development"⁷⁵ within a community. This does not mean that actions are not one's own, but that autonomy does not develop in isolation. However, it is required that the relations in which a human being is embedded, and through which autonomy develops, are "constructive relationships".⁷⁶ This is, relations that enable the "development of original thinking, critical competency and creativity, and therefore key for one's self-development and self-determination"⁷⁷ in a "supportive social environment of critical dialogue and reciprocity".⁷⁸ On the contrary, destructive relationships infringe autonomy: coercion, exploitation, oppression, diminishing one's confidence and self-worth or power imbalance.

Furthermore, this conception of autonomy is based on the positive freedom, i.e., "freedom to/for", which means that considers other variables such as the social status or economic resources to see whether an action to develop their life-plans was autonomous.⁷⁹ In this sense, income adequacy and temporal adequacy are key factors for autonomy: this way, "inadequate income almost always impinges upon people's autonomy";⁸⁰ on the other hand, one cannot be autonomous when having to dedicate loads of hours working to earn money to grant adequate living standards. To this,

⁷⁵ Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 Am U J Gender Soc Pol'y & L, 122.

⁷⁶ Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 Am U J Gender Soc Pol'y & L 130.

⁷⁷ The author refers to relations through which we can discover new areas of interest, construct critical thinking or abilities to be innovative and creative are enhanced.

⁷⁸ Jaunius Gumbis, Vytaute Baciaskaite and Jurgita Randakeviciute, 'Do Human Rights Guarantee Autonomy?' (2008) Cuadernos de la Cátedra Fadrique Furió Ceriol 77, 83.

⁷⁹ Martin Diego Farrell, 'Libertad negativa y libertad positiva' (1989) Revista del Centro de Estudios Constitucionales 2, 12.

⁸⁰ Robert E. Goodin, 'Work and welfare: Towards a post-productivist welfare regime' (2001) British Journal of Political Science 13, 27.

“discretionary time is another important resource in autonomously organising your life as you please”.⁸¹ In this sense, favourable means and resources are fundamental to facilitate the realisation of one’s autonomous decisions as means to achieve self-development, full human potential⁸² and well-being.⁸³

This way, an action is autonomous when is made through an individual-social, constructive, and deliberative process, influenced by healthy social interactions and if socio-economic conditions for its exercise are given by default or ensured by external intervention. This notion legitimizes the external intervention of the state to revert the negative consequences of socialisation, as it’s in a better position to recognise oppressive socialisation or destructive relationships and to address and prevent them.⁸⁴

More specifically, under the relational autonomy, the state would be obliged to intervene within labour relations to ensure the proper conditions for autonomous decisions, i.e., to avoid that the worker is treated as a commodity or as capital to produce economic value in exchange of rights in the labour market. In the same sense, it should help building a constructive relation for a proper exercise of autonomy, where that would imply enhancing workers self-development, private life, well-being, welfare, and the relevance of his interests, amongst others. The same goes for social dialogue: collective bargaining would be considered, under relational autonomy, as a relevant system for constructive relationships and work, helping to temper the unbalanced relation with the employer and promoting a stronger bargaining power for workers.⁸⁵ In fact, it also calls for social dialogue reinforcement and tackling the de-institutionalisation of collective spheres, due to the relevance of socialisation and constructive relations.

⁸¹ Robert E. Goodin, ‘Work and welfare: Towards a post-productivist welfare regime’ (2001) *British Journal of Political Science* 13, 28.

⁸² Jaunius Gumbis, Vytaute Bacienskaite and Jurgita Randakeviciute, ‘Do Human Rights Guarantee Autonomy?’ (2008) *Cuadernos de la Cátedra Fadrique Furió Ceriol* 77, 81.

⁸³ Corinna Brauner et al. ‘Health and work-life balance across types of work schedules: A latent class analysis’ (2019) *Applied Ergonomics*, 81.

⁸⁴ Yael Braudo-Bahat, ‘Towards a Relational Conceptualization of the Right to Personal Autonomy’ (2017) *25 Am U J Gender Soc Pol’y & L* 111, 147.

⁸⁵ Simon Muntaner, ‘El Futuro del Trabajo que queremos: un debate global que resume Jaime Cabeza’ (Según Antonio Baylos, 2019) <https://baylos.blogspot.com/2019/04/el-futuro-del-trabajo-que-queremos-un.html> accessed 15 June.

As an additional point, it is necessary to clarify that this conception of autonomy does not go against the subordination relationship, rather it seeks to strike a fair balance in it, i.e., granting an effective protection and value to workers' personal interests and welfare by breaking the (in)equilibrium in building a constructive relation.

For the exposed reasons, we argue that this notion of autonomy would help in protecting non-productive spaces: firstly, because it enhances individual's self-development and self-fulfilment, which is strictly linked to developing personal interests, projects, and social relations, amongst others. Secondly, because on the effort to build constructive relationships, would help to tackle the productivist ideal and materialise it through the protection of these spaces. Lastly, because of the strong foundation for the state's role in promoting personal autonomy and the conditions for its effectiveness. We will not further extend here, since it has been referred along this work, but it is clear how relational autonomy would help to enhance the proposed courses of actions for sustainable social law, mainly because of the relevance it gives to each human being and their self-fulfilment and well-being, social development, the relevance of collective spheres, and equity-based communities.

The Commissioner for Human Rights in 2008 stated that "personal autonomy is not about being able to do everything on your own but about having control of your life and the possibility to make decisions and have them respected by others".⁸⁶ We believe it is very illustrative how the protection of non-productive spaces under the principle of autonomy would act as this possibility to have one's decisions respected by others, i.e., valuing and confronting personal interests *vis a vis* the employer. We shall see next whether a legal response can be given to what has been argued in this section.

2.2.4. The European Court of Human Rights: right to private life and autonomy.

We have seen that relational autonomy based on positive freedom would help to enhance, in a broader sense, coordinated normative action towards a sustainable social

⁸⁶ Commissioner for Human Rights, Human Rights and Disability, 'Equal rights for all' (Strasbourg, 20 October 2008) CommDH/IssuePaper, Original version, para 5.

law, and more specifically, to legitimise the protection of non-productive spaces. This section will explore whether this conception of autonomy can find a legal basis to protect or call for a regulation of non-productive spaces within the current legal framework.

Personal autonomy is strictly related to human rights, as it underlies in many of them as a general principle of law on equal footing with human dignity as the very essence of the European Convention of Human Rights (“ECHR” or the “Convention”).⁸⁷ In words of Rudolf, it’s the “emanation of human dignity”⁸⁸, which is one of the foundations of the human rights rationale that we find in the Universal Declaration of Human Rights. The relationship between human rights and autonomy is reciprocal: human rights are necessary for development and exercise of relational autonomy, but the latter is also necessary to live a life in dignity with enjoyment of human rights.⁸⁹

In fact, in some pronouncements of the European Court of Human Rights (the “Court” or “ECtHR”), such as *MC v Bulgaria*⁹⁰ or *Evans v the United Kingdom*,⁹¹ it has been referred as a “right to autonomy”. However, it has been given a treatment of “notion” or “principle” consistently in most of the cases. Nonetheless, despite being too premature to label it as a right, it is envisaged an open door in the Strasbourg Court towards a progressive understanding of autonomy from a principle to a right⁹². In any case, its close relation with the conceptualisation of human rights it’s undeniable, as it is considered as an “important principle underlying the interpretation of the Convention guarantees”.⁹³

⁸⁷ Nelleke Kofeeman, ‘(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)’(2010), 5.

⁸⁸ Beate Rudolf, ‘European Court of Human Rights: Legal status of postoperative transsexuals’ (2003) *International Journal of Constitutional Law*, Volume 1, number 4, 719.

⁸⁹ Nelleke Kofeeman, ‘(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)’(2010), Leiden University, 81.

⁹⁰ *MC v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), para 118

⁹¹ *Evans v United Kingdom* App no 6339/05 (ECtHR, 7 March 2006), para 56.

⁹² *Evans v United Kingdom* App no 6339/05 (ECtHR, 7 March 2006), para 56; *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), para 61; Nelleke Kofeeman, ‘(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)’(2010), Leiden University, 10.

⁹³ *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), paras 65 and 90.

Despite that broad relation with human rights, personal autonomy also holds a more specific, interconnected and mutually reinforcing relation with the right to private life. The right to private life *as per* art. 8 ECHR does not hold an exhaustive definition,⁹⁴ rather encompasses a wide range of elements in which autonomy holds a specially relevant role: personal autonomy falls under the scope of the right to private life as an essential aspect of the right to personal and social identity and development, and of the right to establish and develop relationships with other human beings and the outside world⁹⁵. Therefore, the right to private life is not merely limited to an “inner circle” in which an individual develops his personal life, excluded from the outside world, but instead comprises the right to social development, social identity, and personal development, in different environments,⁹⁶ i.e., a right to private-social life.⁹⁷ This link between personal autonomy and private life has been used by the Strasbourg Court mainly in cases that affect a more restricted conception of autonomy: sexual harassment, gender identity or sex discrimination amongst others. However, we argue here that the connection work-private life is more relevant than acknowledged and, with the current statements of the court, through a broad integrative interpretation, a link can be drawn coherently.

The current conception of work undoubtedly affects every human’s private life: the need to work for a wage, precariousness at work, the amount of daily working hours; the lack of time for developing personal priorities or to get involved in family life and other social relations than those at work. Work affects self-determination, self-realisation, self-fulfilment, and the capacity to determine how to live one’s life within a community, forcing individuals to design a life-plan around it in distress, fatigue, and overall unease.⁹⁸ In a broader sense, life-plans are tailored around the demands of work, this is, a continuous labour force attachment with an associated uncertainty of instability,

⁹⁴ *X Y v Netherlands* App no 8978/80 (ECtHR, 5 July 1983), para 22.

⁹⁵ Nelleke Kofeeman, ‘(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)’ (2010), Leiden University, 57.

⁹⁶ *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002); *Niemitz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 29.

⁹⁷ *Ihsan v Turkey* App no 34288/04 (ECtHR, 21 April 2014), para 45.

⁹⁸ Nela Richardson Nela and Sara Klein, ‘People at Work 2021: A Global Workforce View’ (2021) ADP Research Institute <https://www.adpri.org/assets/people-at-work-2021-a-global-workforce-view/> accessed 20 June 2023.

from the completion of formal education until retirement;⁹⁹ it is within those “leftovers” of time that private life elapses. The implications of the current conception of productive work have an effect of impairing private life and autonomy, designing a life scenario that hampers constructive relations and effective possibilities to generate free, genuine, practicable choices, therefore hindering individuals’ development and self-realisation.

In fact, in *Niemitz v Germany*, the ECtHR established that there was no reason to exclude activities of a professional or business nature from the understanding of private life.¹⁰⁰ In the same sense, in *Ihsan v Turkey* it was considered that “restrictions in that area (work) could have repercussions for the development of a person’s relationships with other human beings and therefore for his or her social identity”.¹⁰¹ This allows us to acknowledge the importance of work and its impacts in private life and personal development. Nonetheless, the legal pronouncements refer to this link between work-private life in a positive aspect, i.e., to protect the relevance that work can have in every individual’s development (a space of socialisation, self-realisation, income security...), but does not make an explicit link to assess the negative consequences that work has on private life. We believe here that this connection is fundamental for a full effectiveness of the right, and ensuring a wholesome personal development of workers, both at work and outside of it. Therefore, we argue that it would be not only coherent but a logic consequence to apply the interpretation to the negative aspect as well: this is, how work negatively interferes in autonomy and private life as we referred in the last paragraphs.

The idea of broadening the interpretation of art. 8 ECHR to employment relationship finds another legal foundation on *XY v the Netherlands*. The latter, recognizes that the right to private life operates in two spheres: against interferences by public authorities, but also in the sphere between individuals,¹⁰² which also binds the employment

⁹⁹Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*.

¹⁰⁰ *Niemitz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 29.

¹⁰¹ *Ihsan v Turkey* App no 34288/04 (ECtHR, 21 April 2014).

¹⁰² *X Y v Netherlands* App no 8978/80 (ECtHR, 5 July 1983), para 22; *C v Romania* App no 47358/20 (ECtHR, 30 November 2022), para 61.

relationship. A broad, integrative, interpretation by the Court to include a relational conception of autonomy would still be required, and special consideration for workers well-being and the negative impacts of the productive labour machinery in everyone's private life and their personal development. The legal manoeuvre is not absurd or unfeasible. In fact, it is more convenient and possible than ever in the scenario where new technologies are also affecting individual's autonomy -in how that work is performed- and discussions about a right to human interaction are taking place.¹⁰³ In fact, some scholars have argued that art. 8 ECHR functions as a "positive legal ground for creative approaches",¹⁰⁴ enabling new forms of protection of autonomy: "experimenting with the idea of autonomy in labour law certainly becomes valid".¹⁰⁵

The extension of art. 8 ECHR guarantees to a relational conception of autonomy would have relevant implications. The most intense one, a positive obligation for states to grant a legal framework that protects autonomy through the right to private life regarding the employment relationship, that could be materialised in a legal protection for non-productive spaces. In effect, under art. 8 ECHR the obligation of states may involve "the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves",¹⁰⁶ including adopting an "adequate legal framework"¹⁰⁷ that can also consist in "civil law remedies capable of affording sufficient protection".¹⁰⁸ This would allow to limit the interferences that employers can impose basing on productivity-wise criteria, giving a fair and just value to individual's private life. Another way to approach it, is by considering, for instance, working time regulation that does not allow a proper conciliation with private life, as an illegitimate interference of art. 8 ECHR. However, for this last case, it would keep very reliant to state's interest, since they can have a broad margin of appreciation alleging

¹⁰³ Frank Hendrickx, 'From digits to robots: The privacy-autonomy nexus in new Labor Law machinery' (2019) *Comparative Labor Law and Policy Journal*, vol 40 no 3, 385.

¹⁰⁴ Frank Hendrickx, 'From digits to robots: The privacy-autonomy nexus in new Labor Law machinery' (2019) *Comparative Labor Law and Policy Journal* vol 40 no 3, 381.

¹⁰⁵ Frank Hendrickx, 'From digits to robots: The privacy-autonomy nexus in new Labor Law machinery' (2019) *Comparative Labor Law and Policy Journal* vol 40 no 3, 378.

¹⁰⁶ *Evans v United Kingdom* App no 6339/05 (ECtHR, 7 March 2006).

¹⁰⁷ *Söderman v Sweden* App no 5786/08 (ECtHR, 12 November 2013), para 85; *Tolic and others v Croatia* App no 13482/15 (ECtHR, 4 June 2019), paras 94 and 95.

¹⁰⁸ *Söderman v Sweden* App no 5786/08 (ECtHR, 12 November 2013), para 85; *Tolic and others v Croatia* App no 13482/15 (ECtHR, 4 June 2019), paras 94 and 95.

public order reasons or the proportionality of the measure, e.g., the impact that it could have on companies' survival and in the economy functioning. However, this argumentation based in the productivist ideal will necessarily fall behind in the next decades, changing the course of events: as we have seen, the nexus social law-productivity-climate change is undeniably intense, and this productivist-capitalist conception of economy won't be able to keep as a "legitimate aim"¹⁰⁹ for much longer. In fact, the relevance that autonomy has in a sustainable social law is likely to progressively become a conception "necessary for a democratic society"¹¹⁰ or a matter of "public interest", as criteria to be argued against interferences on private life and sustainable development of societies. In any case, in a broader sense, the protection of relational autonomy through art. 8 ECHR, as core fundamental human right that includes well-being or personal development,¹¹¹ would not only legitimise the protection of non-productive spaces but would open a way for broader changes towards sustainable social law, as envisaged in the section 2.1.

Therefore, private life, interpreted as including relational positive autonomy, operates as the antithesis of the productivist mandate, since it implies an emancipatory claim from the condition of commodity and enables protection of their well-being and fundamental rights at work, by giving value to their judgement, interests, priorities, personal projects, convictions, and personal and social development. It allows to acknowledge and protect the central role of private-social life, self-development and self-fulfilment from the interference that work entails in it. When implemented as a rationale in specific mechanisms, such as the protection of non-productive spaces, it can be translated into the capacity of workers to take empowered, unconstrained, and genuine decisions regarding aspects of the labour relation and its private life, self-development, and self-fulfilment. And doing so without being outweighed by employer's economic or organisational interests. In turn, an inversion of the leverage, in logic with

¹⁰⁹ It refers to one of the criteria that the ECtHR uses to justify an interference on art. 8 ECHR. See *Ihsan v Turkey* App no 34288/04 (ECtHR, 21 April 2014); *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), para 70.

¹¹⁰ *Ihsan v Turkey* App no 34288/04 (ECtHR, 21 April 2014); *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), para 70.

¹¹¹ *Spadijer v Montenegro* App no 31549/18 (ECtHR, 9 November 2021), para 80.

the productivist disentanglement, deviating from the traditional unbalanced relationship where employer's interests consistently outweigh the workers' ones and where workers are treated as mere "elements of the atmosphere"¹¹² that produce economic value.

In conclusion, we argue that there is an open door to articulate relational autonomy's legal protection through art. 8 ECHR as a first way forward towards sustainable social law and addressing, in an intersectional way, the relevant impacts - both environmental and social - of climate change. This would imply the positive obligation for states and public authorities to build a system of guarantees for its exercise, which, as we have seen, could be materialised, amongst others, in the creation of a legal framework to protect non-productive spaces. Furthermore, this intervention should be immediate, as the legal foundation is a human right not subjected to progressive realisation or to availability of resources, i.e., art. 8 ECHR. In conclusion, we argue that protection for non-productive spaces can be afforded through a broad interpretation of the right to private life 8 ECHR, as including the principle of personal autonomy, understood from a relational conception.

¹¹² Perez Rey and Antonio Baylos, *El Despido o la violencia del poder privado*, (Madrid, Trotta 2009), 35.

PART TWO. THE PROTECTION OF AUTONOMY WITHIN WORKING TIME REGULATION: A MULTILEVEL ANALYSIS.

The second part of this work aims to elucidate whether the principle of autonomy - as envisaged in the first part - is protected or valued within the current legal framework. We shall focus the analysis in working time regulations due to the major implications that it has on the private life and the personal development of workers and its strict link to autonomy.

The analysis shall be focused from a multi-level perspective, examining, firstly, the European Directives on working time and work-life balance, and the pronouncements of the Court of Justice of the European Union. Then we shall briefly focus on the Spanish legal framework and a relevant case of its Constitutional Court concerning autonomy and working time.

Chapter 1. European Union regulations on working time and the Court of Justice of the European Union.

1.1. The conception of time from ILO regulations to our days.

Working time is a central element both in the undertaking of work and the development of each human being's private life. It affects a whole life-plan, tailored around the amount of time that one must devote to work, and the relevance of its income for a decent livelihood. It has therefore major implications on the (lack of) capacity of individuals to devote to their personal interests, priorities, and goals and to freely organise their private and family life. In essence, hindrances for one's self-development, self-fulfilment, and self-determination within a community, and on their role-setting as citizens.

For social law, working time is also a cornerstone aspect of working conditions, since it was one of the first topics to be regulated at transitional level, by the very first ILO Convention in 1919. In the context of new industrial labour relations, it became imperatively urgent to put some restraints on daily and weekly hours to protect workers from suffering from slave-like working conditions,¹¹³ e.g., undergoing through endless working hours. To that end, the referred convention set maximum daily and weekly limits thereto and resting periods for consecutive days of work. The protection of these industrial labour relations was the target of the very first holistic labour regulation at transnational level, through ILO's standard-setting, that have been serving as a baseline and influence for legal development over the years.¹¹⁴

These labour relations were based in two relevant aspects: the first, a masculine conception of the lifecycle and, secondly, a binomial conception of time. The first one refers to the establishment of "man as a breadwinner and provider for a family living,

¹¹³ International Labour Office 'Rules of the game: An introduction to the standards-related work of the International Labour Organization' (Geneva, 2019), 41.

¹¹⁴ Lee Swepston, 'How the ILO embraced Human rights' in Janice Bellace and Beryl ten Haar (eds), *Research Handbook on Labour Business and Human Rights Law* (2019).

while placing women as responsible for the biological and social reproduction of families”,¹¹⁵ the latter as economic entities to support the consumption model. The second one, refers to the conception of time as a binomial of work and rest. Lifetime was conceived as a “continuous labour force attachment out of the completion of formal education and until retirement”,¹¹⁶ and implied, on daily basis, either being working - for most part of the day - or physically resting to be able to perform for the next working day. We can already see back in the early 20th century the shaping process of a productivist rationale under the first regulations on working time and in the overall building process of social law. The departing point was the need to maintain high-levels of productive-continuous employment while ensuring commodified workers with minimum rest periods in a dual conception of lifetime.¹¹⁷ To that end, workers were treated as economic units that needed to be physically capable to perform highly productive during long periods of hours, trading their labour force (and rights) for a living wage.¹¹⁸ In most cases due to the physical demand of the work performed, these resting periods were roughly enough to get physical rest and being able to perform on the next working day.

Today, while the centrality of work in societies organisation and in determining one’s life remains as a crucial matter, life’s social conception has undergone significant changes. The cultural understanding of time has shifted from a dual conception (work-rest) to a multidimensional understanding, i.e., it’s not limited it to the work-rest binomial, but we, as individuals, value the need for personal time management, socialisation, or leisure.

¹¹⁵ Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 132.

¹¹⁶ Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 132.

¹¹⁷ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 102.

¹¹⁸ Antonio Baylos Grau, ‘El futuro de las normas de trabajo que queremos’ (2017) *Cuaderno Jurídico y Político Volumen 3, Número 10*, 51

Despite this new understanding of time, the reality, shaped by the demands of productivism and the need for economic growth, shows some conflicting outcomes: the first one, a new paradigm vectored by productivism and technological development that implies a merger of working time, resting time and leisure time: an entanglement between work-private life. The first flexibility measures on working time that once looked like an adequate time management are now converted to a “free auto-exploitation”¹¹⁹ (from a liberal autonomy point of view) that perpetuates precariousness, mostly under non-standard new forms of employment.¹²⁰ The second one points to the fact that the priority of having free time for leisure, socialisation, or to devote to personal projects or interests exceeds the need for essential time to recover for the effort that work entails.¹²¹ However, the productivist ideal that embeds the regulations regarding working time obstructs a major engagement in personal priorities. And the last one, as we shall see next, the European regulations on working time still hold a dual conception of time despite the aforesaid.

In conclusion, our current understanding of work has shifted from a dual to a multidimensional understanding; however, we argue that due to the productivist embedment within working time regulations, *de facto*, private life and working time are “not conciliated but rather merged and confused”¹²² which also complicates to firstly, elucidate the real number of hours worked beyond the statistics, and secondly, recognising the specific effects that working time has on the establishment of autonomous life-plans - where they get merged- and the mental workload that it entails. The explanation of the scenario that has been drawn above, can be found in the current regulations on working time.

¹¹⁹ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 106.

¹²⁰ Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 95.

¹²¹ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 104.

¹²² Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 106.

We will now assess the conception of working time and the relevance of personal life thereof, within two of the main European legal instruments on the matter: the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (the “WTD” or “Working Time Directive”) and the Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (the “WLBD” or “Work-Life Balance Directive”), to see whether we can find any room for autonomy and the protection of non-productive spaces, and assess the entanglement between work and private life.

1.2. EU Directive 2003/88: health and safety as a narrow rationale and the dual conception of time.

To better understand the current entanglement between hours of work and private life we need to assess the WTD as the main instrument on working time at the EU level, focusing on its rationales and on the conception of time that it holds to then see whether we can find any room for autonomy and the protection of non-productive spaces.

1.2.1. Health and safety and the dual conception of time

The WTD has two relevant aspects that we want to emphasize on, as relevant for this work: the adoption of health and safety as a legal rationale, and a dual conception of time, inherited from the first ILO regulations.

The WTD sets a harmonised floor across the EU for the development by Member States of better working conditions regarding working time. It seeks to protect workers’ health and safety against excessive or inadequate working hours with little recovery and rest time, to avoid the impacts that it might have on their health (injuries, mental fatigue, increased risk for occupational hazards...). This way, working time is the object of EU regulation, not as a working condition but as a risk factor for health and safety¹²³. Taking

¹²³ Carmen Sáez Lara, ‘Jurisprudencia comunitaria sobre ordenación del tiempo de trabajo’ (2015) *Temas laborales: Revista andaluza de trabajo y bienestar social* 130, 244.

the latter as a rationale implies a narrow approach that limits the protection of working time to aspects strictly linked to health and safety: minimum weekly and daily rests breaks, paid holidays, or weekly working time limits, leaving aside any consideration towards private life, autonomy, or conciliation. This narrow understanding protects the worker, mainly, to separate from the working environment during a certain number of hours considered as a minimum to overcome the fatigue inherent in the exercise of his duties,¹²⁴ far from valuing autonomy-related items like one's personal priorities, self-development, or socialisation.

On the other hand, these protections focused on health of workers take as a baseline a dual conception of time, i.e., lifetime is based in a binomial work-rest, and assumes that life plans must revolve around the undertaking of work. This conception, that has already been mentioned, stems from the first ILO Conventions that sought to protect workers from the exposure to long hours of work and barely rest periods, in very physically demanding industrial jobs. Despite the life conception has dramatically changed nowadays, as we suggested before, the WTD adopted a similar dual conception of time only recognising two categories that are, as stated by the Court of Justice of the European Union ("CJUE"), "mutually exclusive":¹²⁵ working time and resting time. In turn, a very narrow approach to working time given the importance and the impact it has on one's private life and self-development.

Surprisingly, autonomy or private life are not mentioned anywhere in the legal text despite the influence that working time has on the latter. We will assess the implications of the health and safety rationale and the dual conception of time in the WTD, and what room do they leave for the valorisation of autonomy and the devotion to personal priorities or socialisation.

¹²⁴ Carmen Sáez Lara, 'Jurisprudencia comunitaria sobre ordenación del tiempo de trabajo' (2015) *Temas laborales: Revista andaluza de trabajo y bienestar social* 130, 263.

¹²⁵ Case C-303/98 SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana (3 October 2000).

1.2.2. Minimum standards or re-commodifying work(ers)? The implications of the health and safety rationale and a dual conception of time in the Working Time Directive.

It is true that this approach of the WTD allowed for the crystallization of a minimum harmonised floor in the whole EU, protecting workers' health from the most flagrant abuses concerning working time and freeing workers from slave-like conditions, as a basic health matter. However, we will develop now a critique based on two arguments: the first, that it affords a necessary but neither adequate nor sufficient protection to the current societies and their life-time conception, by taking health and care as rationale and a dual conception of time; and secondly, an excessive use of flexibility measures. And that, we argue, turns out to contribute to the perpetuation of the eco-socially unsustainable productivist model:

Firstly, by regulating on working time only as a health and safety issue, the WTD completely ignores the relevance that it has on private life beyond health, i.e., working time determines our lifetime, life-plans, and has an impact on our personal growth, social development, self-realisation, or self-fulfilment. In addition, it conceives lifetime as a binomial between work and rest, where the latter is only valuable as a minimum period to overcome the fatigue inherent in the exercise of his duties. In short, WTD approach protects spheres of time as relevant for their health and safety not as valuable in themselves. For instance, it does only place a limitation of 48 hours/week not because it values autonomy and private life or seeks to protect it as non-productive spaces, but to protect workers safety¹²⁶. We believe that this rationale alone is protecting instead a productivist conception of working time: it seeks the protection of minimum standards, based on health of the worker, as means to keep them into the workforce wheel, i.e., taking care of only the minimum vitals related to health and safety so they can keep engaged in production at normal rates of efficiency. Therefore, the protected minimum spheres of time are valuable to avoid health-related issues but also for efficiency and competitiveness. Proof of that is that it still holds an ancient dual

¹²⁶ Council and European Parliament Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (2003) OJ L 299, 9, Art 21.

conception of time,¹²⁷ not valuing any other sphere of time rather than rest to overcome the fatigue, i.e., leisure time, socialisation or devotion to personal interests is not valued in itself but left as a tangential matter.

At this point, one could argue against that basing in WTD recital 4: “the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations”. However, the critique that we address here is not about a direct subjection to economic considerations but rather a limited understanding of time (dual conception) and through a narrowed rationale (health and safety) that does not allow for an effective and adequate protection of workers on working time, and that can be read to protect instead a productivist paradigm. The Directive has undergone a rough debate and many review procedures in which it was clear how “uneasy the balance and high the tensions between the Directive’s social and economic objectives”¹²⁸ and, despite not being drafted originally as a productivist-instrumental legal document, it contributes to support the model, while tempering it through minimum floor dispositions.

Secondly, we will refer to the use of excessive flexibility that undermines the effectiveness of an already narrowed protection. As a general issue, competitiveness of the market has required companies with more flexibility in the organisation of work. Here, under the excuse of adaptation to new forms of work and not obstructing companies’ development, flexibility has mainly translated into employer-oriented flexibility, i.e., “aimed at achieving the goals of employers such as reducing labour costs and diminishing the power of workers”.¹²⁹ This has led to a “freely accepted”¹³⁰ auto-

¹²⁷ Marta Glowacka, ‘A little less autonomy? The future of working time flexibility and its limits’ (2021) *European Labour Law Journal*, Vol 12 No 2, 125.

¹²⁸ Ania Zbyszewska, ‘Towards a More Holistic Vision of Working Time? Revision of the Working Time Directive as a Litmus Test for EU’s Commitment to Gender Equality’ (Labour Law Research Network Inaugural Conference, Barcelona, June 2013), 25.

¹²⁹ Philip Bohle, ‘Work-life conflict in “flexible work”: Precariousness, variable hours and related forms of work organization’ In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 92.

¹³⁰ From a liberal point of view, i.e., not expressly coerced choice.

exploitation¹³¹ that perpetuates precariousness, i.e., valuing autonomy only when it's targeted to productive matters, mostly under non-standard new forms of employment.¹³² These processes are bannered by the individualisation and de-institutionalisation of collective sphere and seek to deviate from the statutory and more solid protections that standard forms of employment provide. Well, we argue here that the WTD contributes actively to this scenario where work and private life are entangled and where the worker has barely any capacity to take autonomous decisions to confront the productive model, rather given with a bogus autonomy or time management oriented to produce and to fulfil employer's interests.

As we were arguing, notwithstanding its protective functions, the WTD provides for considerable flexibility in organisation of working time to allow for a more efficient undertaking of labour within the company. The WTD allows for both collective extensions of work through substantially long reference periods, and through the opt-out, as an individual and more permanent extension of work, that allows employees to sign off on their weekly maximum hours of protection.¹³³ Although overtime hours must be balanced with time off, the extended reference periods imply that "increased hours can be potentially carried over significant periods of time".¹³⁴ This way, the WTD's tendency to increase working hours through extended reference periods and through the opt-out clause "directly conflicts with the overriding objectives of health and safety"¹³⁵ and seems to point to what we argued before: "as long as the objectives of health, safety and adequate rest are safeguarded, a worker's time can be stretched

¹³¹ Pilar Charro Baena, 'La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa' in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 106.

¹³² Leah F. Vosko, 'Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness' (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 5.

¹³³ Carmen Sáez Lara, 'Jurisprudencia comunitaria sobre ordenación del tiempo de trabajo' (2015) *Temas laborales: Revista andaluza de trabajo y bienestar social* 130, 244.

¹³⁴ Ania Zbyszewska, 'Towards a More Holistic Vision of Working Time? Revision of the Working Time Directive as a Litmus Test for EU's Commitment to Gender Equality' (Labour Law Research Network Inaugural Conference, Barcelona, June 2013), 5

¹³⁵ Ania Zbyszewska, 'Towards a More Holistic Vision of Working Time? Revision of the Working Time Directive as a Litmus Test for EU's Commitment to Gender Equality' (Labour Law Research Network Inaugural Conference, Barcelona, June 2013), 5

significantly to accommodate the needs of the enterprise”.¹³⁶ With regards to the opt-out clause, in fact, we can envisage a clear example of the importance of negative or liberal autonomy to protect productive spaces, i.e., a bogus autonomy or an autonomy to produce: under excuses of flexibility, an option is given to employees to extend their working hours when their free, express, and individual consent is met.¹³⁷ Even when complying with these guarantees, the notion of “freedom” that is taken is the negative-liberal one, that only requires for a decision to be autonomous that it is taken through an individual reflection process.¹³⁸ This, disregards other factors - mainly socioeconomic aspects- that hampers the worker to take an effective autonomous decision and, in fact, vulnerates one’s autonomy (from a positive-relational understanding), valuing it only when it implies a possibility to further contribution on productivity.

Thus, we believe that by means of its narrowed approach and the considerable flexibility measures, the WTD contributes to the current scenario described above where working time, resting time and leisure time are merged, work and private life are entangled, and where workers are commodified and treated as human capital to produce economic value, whose health is worth protecting, mainly, for competitiveness-efficiency reasons. To this point, we argue that no room for autonomy can be found in a model that vectors the productivist ideals and that only accomplishes its protective function partially. Despite that, we need to stress that we don’t neglect the importance of the WTD on the protection of workers, rather that it’s approach and scope are insufficient to grant adequate and effective protection for sustainable workers.

Conversely, a regulation of working time based on personal autonomy, under the protection of the right to private life, as stated in the first part of this work, would not allow for a normative action that institutionalises precariousness through working time, by neglecting adequate periods to devote to personal priorities and interests that are

¹³⁶ Ania Zbyszewska, ‘Towards a More Holistic Vision of Working Time? Revision of the Working Time Directive as a Litmus Test for EU’s Commitment to Gender Equality’ (Labour Law Research Network Inaugural Conference, Barcelona, June 2013), 6

¹³⁷ Case C-303/98 SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana (3 October 2000), para 74.

¹³⁸ Martin Diego Farrell, ‘Libertad negativa y libertad positiva’ (1989) *Revista del Centro de Estudios Constitucionales* 2, 9.

not related to productivity. Instead, taking personal autonomy as a rationale to protect non-productive spaces, as already argued, would help to institutionalise this “*sui generis* third understanding of time”¹³⁹ that goes beyond the mere recovery from work and that is linked to personal development and private life, ensuring a separation between the diverse conceptions of time, and limiting a dangerous -only for the worker- overlapping under excuses of bogus autonomy or employer-oriented flexibility.¹⁴⁰

1.2.3. The Court of Justice of the European Union: a reinterpretation of health and safety and Matzak’s case: any room for autonomy?

The narrowed conception of the WTD and their predecessors, brought the CJUE to take a broad interpretation of health and safety at work according to the World’s Health Organisation’s, to adapt to new situations that the text of the WTD couldn’t address properly. In *UK v. Council*, the CJUE defined health as a “state of complete physical, mental and social well-being”,¹⁴¹ and stated that working time and resting time have to be interpreted according to this broad understanding of health. This way, health is not merely conceived as a state with absence of illness or disease, but an overall state of well-being.¹⁴² By introducing well-being within the health and safety requirements, it opens a door to include autonomy within the equation of working time, as a necessary element to grant workers with effective well-being. This way, autonomy would also help to temper and balance the productivist understanding that health and safety could possibly imply, acting in coordination.

Additionally, the CJUE has left a door open for a recognition of non-productive spaces and leisure time, despite its interpretation is still far from it: in *Matzak’s case* (C-518/15)

¹³⁹ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 104.

¹⁴⁰ Philip Bohle, ‘Work-life conflict in “flexible work”: Precariousness, variable hours and related forms of work organization’ In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 92.

¹⁴¹ Case C-84/94 *UK v Council of the European Union* (12 November 1996), para 15.

¹⁴² Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021).

the Luxembourg Court established that on-call time should be interpreted as working time when the specific circumstances entail a restriction that objectively limit the possibilities “to devote himself to his personal and social interests”¹⁴³. It replicates the same argument in ulterior cases where the call to incorporate to work was limited to “some minutes” insofar as such a short period of time discourages the worker from planning any other activity during that period¹⁴⁴. The relevant point is to determine whether the limitations that the worker is subdued to are of such an intensity that “affect objective and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests”.¹⁴⁵

Other relevant pronouncements point in the same way to a relativisation of the dual conception and the productivist embedment of the WTD: for instance, on SIMAP, Jaeger and Dellas cases the CJUE has established that working time does not require the joint concurrence of permanency, availability and to be in the exercise of its duties¹⁴⁶, i.e., the intensity or the productive character of the activity does not determine whether that time is considered as working time.¹⁴⁷ Or even the presumption of working time when the person is not free to choose their location or activity but instead it’s subject to availability for the company.¹⁴⁸ In addition, the White Paper on EU Directives and Reform of OSH and Labour Relations’ Legislation recognises that “acceptable levels of well-being of those who produce” are relevant to classify a product as good, or that “the promotion

¹⁴³ Case C-518/15 *Ville de Nivelles v Rudy Matzak* (21 February 2018), para 63.

¹⁴⁴ Case C-344/19 *DJ v Radiotelevizija Slovenija* (9 March 2021); Case C-580/19 *Stadt Offenbach am Main* (9 March 2021); Case C-107/19 *XR v Dopravni podnik hl m Prahy* (9 September 2021).

¹⁴⁵ Case C-214/20 *MG v Dublin City Council* (11 November 2021).

¹⁴⁶ Carmen Sáez Lara, ‘Jurisprudencia comunitaria sobre ordenación del tiempo de trabajo’ (2015) *Temas laborales: Revista andaluza de trabajo y bienestar social* 130, 244.

¹⁴⁷ Ignasi Beltran de Heredia Ruiz, ‘Sobre el tiempo de trabajo: qué es y qué no es (últimos criterios interpretativos)’ (*Una mirada crítica a las relaciones laborales*, 12 September 2019) <https://ignasibeltran.com/2019/09/12/sobre-el-tiempo-de-trabajo-que-es-y-que-no-es-ultimos-criterios-interpretativos/> accessed 28 May 2023.

¹⁴⁸ Ignasi Beltran de Heredia Ruiz, ‘Sobre el tiempo de trabajo: qué es y qué no es (últimos criterios interpretativos)’ (*Una mirada crítica a las relaciones laborales*, 12 September 2019) <https://ignasibeltran.com/2019/09/12/sobre-el-tiempo-de-trabajo-que-es-y-que-no-es-ultimos-criterios-interpretativos/> accessed 28 May 2023.

of well-being at work becomes a renewed goal”,¹⁴⁹ envisaging a willingness to change the perspective.

These pronouncements of the CJUE bring flexibility to the dual conception of time adopted by the WTD and seems to implicitly recognise a *sui generis* “third time” where individuals can devote to their personal interests. And this “third time”, would be effectively protected, according to the CJUE approach, through its link with well-being, as an element of health and safety, under a broad interpretation by the Luxembourg Court. The link has not been made that obvious yet by the CJUE, but we can envisage an open door. This approach allows for a relativisation of the critique that we formulate herein and slightly opens the door for autonomy and private life as, at least, a complementary rationale of health and safety, by recognising that the opposition of working time, i.e., rest time, goes beyond that physical recovery or distancing from work.¹⁵⁰ However, for these aspects that can draw some room for autonomy to have a relevant and broad impact on working time regulations, they have to be incorporated in a legal text that broadens the narrowed scope of the WTD, that, despite these interpretations, is still limited to aspects strictly linked to health,¹⁵¹ such as minimum weekly and daily rests breaks, paid holidays, or weekly working time limits. Therefore, a next step towards the recognition of autonomy and private life as essential aspects of working time regulation requires firstly, to establish by the CJUE a strong connection between the “third time”, i.e., leisure time not linked to productivity but to personal development, and well-being as matter of health and safety. And, secondly, a revision of the WTD to include a broader scope of working time protections -other than maximum working hour and minimum rest periods-, which has been proven an impossible task within the last decades.¹⁵²

¹⁴⁹ International Labour Organisation “White Paper” EU Directives and Reform of OSH and Labour Relations’ Legislation (2019) https://www.ilo.org/budapest/what-we-do/projects/enhancing-labadmin-ukraine/publications/WCMS_689355/lang--en/index.htm accessed 28 June 2023.

¹⁵⁰ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021).

¹⁵¹ Marta Glowacka, ‘A little less autonomy? The future of working time flexibility and its limits’ (2021) *European Labour Law Journal*, Vol 12 No 2, 128.

¹⁵² Carmen Sáez Lara, ‘Jurisprudencia comunitaria sobre ordenación del tiempo de trabajo’ (2015) *Temas laborales: Revista andaluza de trabajo y bienestar social* 130, 250.

Despite the latter, autonomy is still far from being recognised as a rationale or being given value. It is true that it is envisaged an open door for a recognition of a leisure or third time that can be linked to health and safety through well-being, as CJUE seems to point to. This implies an eventual recognition of the effects of leisure and the devotion of time to personal interests as a matter of health, but still does not entail a protection of autonomy, i.e., the capacity of the worker to give value to his decision on when to take this leisure time, confront the organisation power of employer, or be a decisive part in the time distribution that affects his life, amongst others, and that has been proven to reduce work-life conflict, enhance social life and greater satisfaction and well-being.¹⁵³ And as we argued in the first part, we believe this is fundamental for a sustainable social law that disentangles from the productivist ideal and the commodification of work.

To conclude, we believe that it is relevant that autonomy is recognised as a valuable aspect in itself within working time regulations, i.e., giving value to the capacity to take genuine, effective and unconstrained decisions regarding working time as a central matter of their private life, affecting therefore one's personal development, self-realisation, self-fulfilment, or socialisation out of work, rather than as means to protect well-being as a matter of health and safety. Otherwise, the protection of one's autonomy could be left as a tangential matter if it is considered that an ambiguous overall well-being is already fulfilled. In fact, we believe that linking well-being as a health and safety matter instead of to autonomy, could contribute to its perversion, i.e., taking a reductionist understanding of well-being, as a mere overall satisfaction state. Considering then that it's fulfilled, for example, when a worker would not be exploited in the number of working hours and the wage allows her to make a living, but she still wouldn't be a relevant agent in the distribution of her working time, or on how and when to devote to her personal interests for her self-fulfilment, out-of-work socialisation, or self-realisation. In any case, it is a path worth exploring towards a broader understanding of lifetime by the WTD and, eventually, a greater protection.

¹⁵³ Philip Bohle, 'Work-life conflict in "flexible work": Precariousness, variable hours and related forms of work organization' In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 101.

1.3. EU Directive 2019/1158: work-life balance for parents and carers.

The so-called directive on work-life balance seeks to contribute to the gender equality goals regarding labour opportunities, equal treatment at work and equal sharing of common responsibilities. It entitles workers who are parents and carers with individual rights on paid leaves for parents and carers, as well as flexible working arrangements, with emphasis on the protection against discrimination. Then, its main rationale is the contribution to equality between men and women, mainly: the equal sharing of caring responsibilities, equal access to the labour market and equal treatment at work.

The WLBD is also a milestone on equality of opportunities for women to access the labour market. The underlying idea is facilitating the exercise of parental responsibilities, in order to grant an earlier return to the labour market for women, so they are not undermined on their working career opportunities. To this end, for instance, it grants with an untransferable compulsory right for both parents.

In addition, the WLBD aims to facilitate the reconciliation of work with family life. To that end, it protects an understanding of private life limited to family life; still broader than the WTD did. It also protects a broader notion of time, not limited to work-rest dichotomy. Overall, it is very much focused on how to better integrate family life with work rather than on the conception of time and its understanding, protecting a non-productive space devoted to family life.

Despite being a relevant legal text for the protection of family life and, in this sense, a major improvement from the WTD, some of its aspects hamper its original objectives and are embedded within the productivist ideal, still far from protecting autonomy as valuable and even from ensuring an effective protection of family life:

Firstly, employers' prerogatives are enhanced to counter (un)balance the possibility for workers to conciliate with family life or fore care-giving reasons,¹⁵⁴ what can impair the real effectiveness of the measures, making them reliant to employer's interests, i.e., protecting family life through employer-oriented flexibility.¹⁵⁵ This has been proven to negatively contribute to well-being of workers.¹⁵⁶ Although the legal rationale of the WLBD is gender equality and equal treatment, it still seeks full-productive employment objectives, e.g., "to encourage workers who are parents and carers to remain in the work force".¹⁵⁷ The enhancement of the employer's prerogatives, already unbalanced by nature, are justified under the misleading argument of disincentive creation of companies or putting excessive burdens on them.¹⁵⁸ The insistence of the legislator on keeping an armoured unbalanced distribution of powers between the labour relationship agents goes even beyond the rationale the texts pretend to protect, reducing its effectiveness. As we have seen, the non-intervention on the unbalanced labour relations is the antithesis of empowering worker's autonomy, and therefore, of breaking the (in)equilibrium. In the case herein, as a matter of example, it is left under the decision-making power of the employer whether to accept the flexible working arrangements practically at will¹⁵⁹ -by arguing an undetermined lack of "resources and operational capacity";¹⁶⁰ or opening the door for Member States to decide on the right for employers to postpone the leaves and to refuse any other adaptation other than on full-time distribution;¹⁶¹ or even by recommending member states to implement the

¹⁵⁴ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 34.

¹⁵⁵ Philip Bohle, 'Work-life conflict in "flexible work": Precariousness, variable hours and related forms of work organization' In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 91 and 92-97.

¹⁵⁶ Philip Bohle, 'Work-life conflict in "flexible work": Precariousness, variable hours and related forms of work organization' In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 101.

¹⁵⁷ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 35.

¹⁵⁸ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 48.

¹⁵⁹ Giovanni Costa et al 'Influence of flexibility and variability of working hours on health and well-being' (2006) *Chronobiology International* Vol 23 No, 1125.

¹⁶⁰ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 36.

¹⁶¹ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 23.

WLBD striving to “avoid imposing (...) an excessive burden to employers”.¹⁶² In the same sense, the European Council recognises that EU and national legislation, following the WLBD should “promote flexibility for both employers and workers” or “generate economic growth”.¹⁶³ We have already seen that flexibility is frequently used as a precariousness mechanism under excuses of a bogus autonomy and it’s, overall, employer oriented, i.e., to satisfy the companies’ needs and objectives, usually linked to the reduction of costs for competitiveness.¹⁶⁴ The double-side action of the EU here moves in the opposite direction to sustainable social law. On one hand, they pretend to endeavour towards decent work and a broader protection of workers, but, on the other hand, they keep enhancing policies strictly linked to precariousness, such as employer-oriented flexibility or non-standard forms of work,¹⁶⁵ that are linked to promoting competitiveness of companies and the need to high-rates of production to generate more economic growth. A balanced promotion of rights in a naturally unbalanced relationship only perpetuates precariousness for the weak part and omits the protective function that social law should enhance towards a just transition. In essence, placing the employer’s needs over the alleged rationale of the legal text, which might imply, not only ignoring the worker’s needs and preferences -other than caregiving to relatives-, but the ineffectiveness of the rights intended to protect.

Secondly, the WLBD’s scope is rather limited, and despite implying a protection of a non-productive spacetime, does not allow for a recognition of autonomy, rather only for caregiving purposes. The WLBD’s conception of private life reduces it to “family life” goes against the broad interpretation given by ECtHR on art. 8 ECHR. Again, the scope is very limited since it only protects workers’ right to request flexible working arrangements “for

¹⁶² Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 48.

¹⁶³ <https://www.consilium.europa.eu/en/policies/work-life-balance/>

¹⁶⁴ Philip Bohle, ‘Work-life conflict in “flexible work”: Precariousness, variable hours and related forms of work organization’ In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 92.

¹⁶⁵ Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 5; Philip Bohle, ‘Work-life conflict in “flexible work”: Precariousness, variable hours and related forms of work organization’ In Janet Barnes-Farrell, Philip Bohle and Irena Iskra-Golec (eds) *Social and family issues in shift work and Non-standard working hours* (2016), 92.

the purposes of providing care”,¹⁶⁶ i.e., omitting any other aspects of private life, reducing autonomy to caregiving and family responsibilities. This way the WLBD does not offer protection for private life through autonomy: rather it seeks to keep individuals in the workforce, while allowing them to apply for working time arrangements only for caregiving purposes. To top it off, the enhanced prerogatives of the employers can impair the effectiveness of an already scope-limited protection. Valuing autonomy would imply broadening the scope of protection to encompass personal interests other than the need to take care of relatives, and to confront this right to the employer, counter-balancing the latter’s empowered prerogatives.

To our work, it is worth analysing recital 34 of the WLBD, as it contains a clause that could be considered as a slight deviancy from the main rigid rationale this part has been discussing about and, therefore, a potential opened way for autonomy: the first justification for flexible working time arrangements within the WLBD is a crystal-clear reflection of the productivist paradigm: “to encourage workers who are parents and carers to remain in the work force”.¹⁶⁷ Thus, one could interpret that legal subjects do not deserve the protection by themselves as ends, i.e., as individuals whose personal development matter, but instead treated as means, as a measure to keep them in the workforce wheel. Despite that being the main rationale behind this measure, the text recognises that workers “should be able to adapt their working schedules to their personal needs and preferences” and doing that “(...) with a focus on worker’s needs”. To that end, several mechanisms are offered: adjust working patterns, include remote working arrangements, flexible working schedule or reduction of working hours. Apparently, a slightly opened door to the recognition of autonomy through the consideration of private life’s relevance at work, despite it is adopted under a rather opposed logic, i.e., keeping them in the workforce. Nonetheless, the closing part of the paragraph is essential and points out to a dead-end street for autonomy when assuming

¹⁶⁶ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 34.

¹⁶⁷ Council and European Parliament Directive (EU)2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (2019) OJ L 188, 79, para 27.

that this working time adaptations are only “for the purposes of providing care”, what narrows the scope and closes the door for autonomy to play a role thereto.

Despite it does not fall entirely within the scope of this work, we will make a quick mention to argue here that a holistic in-depth assessment and review on the system of caregiving would be required, rather than partially assess it through a labour law-related regulation:

In effect, the caregiving system, and the development of the productivist rationale are closely linked. Historically, women have been conceived as responsible for the biological and social reproduction of families:¹⁶⁸ firstly, by not participating in the workforce and on later stages by taking most of the leaves and permits for caregiving. This way, women were originally relegated to caregivers in a household while man provided for a living income while holding the production system and economic growth.¹⁶⁹ The sustained and never-ending objectives of economic growth demanded for a greater incorporation of workforce and the gender equality postulates called for the same, as well, which lead to a greater incorporation of women to the labour market. However, the latter implied that the household and caregiving system was not sustained enough. This way, the permits and leaves that social law originally conceived for gender equality goals have been instrumentalised to allow women within the productive work market to take care as well of unpaid caring responsibilities.¹⁷⁰ In effect, we believe that the caregiving system is being perverted for productivist goals, hampering other gender equality aspects, e.g., the non-respect of the biological rhythms of women when prematurely returning to work, the feminisation of some labour sectors, as caregiving work, or the institutionalisation of double full-time jobs for women, i.e., their contribution both to productive paid employment and the unpaid caring responsibilities

¹⁶⁸Leah F. Vosko, ‘Temporary Work in Transnational Labor Regulation: SER-Centrism and the Risk of Exacerbating Gendered Precariousness’ (2008) *Pathways from Casual Work to Economic Security: Canadian and International Perspectives*, 132.

¹⁶⁹Tatsiana Ushakova, ‘De la conciliación a la desconexión tecnológica. Apuntes para el debate’ (2016) *Revista española de derecho del trabajo* 192, 117.

¹⁷⁰Jesús Cruz Villalón, ‘Elementos condicionantes para la efectividad de la conciliación laboral en España’ in Lourdes Mella Méndez (ed) *Conciliación de la vida laboral y familiar y crisis económica. Estudios desde el Derecho internacional y comparado* (Delta 2015).

- to which they access by means of flexibility measures based on work-family life balance. To this end, it is extremely relevant a shift from the cultural conception, but also a targeted normative action. In this sense, we believe that coordinating the relational autonomy concept as defended in the first part of this work, with gender equality would allow for major steps on this regard, but this should be address in different research.¹⁷¹ To conclude this last point, we envisage the WLBD's willingness to tackle the issue, trying to enable man to take part within family responsibilities and providing women with the right scenario to incorporate within the labour force. However, as we pointed out before, firstly, the measures are not as effective as they should be, and secondly, they are not enough to tackle the perversion of the caregiving system and the instrumentalization of women for caring purposes.

To conclude, we argue here that, by taking relational autonomy as a rationale, two of the main problems pointed here could be properly addressed, i.e., the limited scope to care-giving and family life, and the disproportionate prerogatives of the company *vis-à-vis* the lack of value of personal interests of the employee:

Firstly, because from a relational autonomy perspective, it stems an entitlement to place personal priorities and beliefs before companies' mandates that already would include rights to reconcile work-family life, but also to reconcile work-private life, i.e., a broader protected scope. That would also allow the protection of many other non-productive personal projects and does not exclude the need for legislation on promotion of gender equality. In fact, they must be taken complementarily since they don't necessarily pursue the same objectives. This way the effectiveness of the conciliation would be granted, by a limitation of the employer's prerogatives under the principle of autonomy that would entail giving value to one's self-development, personal interests, and self-fulfilment. Secondly, closely related to the latter, autonomy would help to give enough value to individual's needs, interests, and life-plans to confront the employer's organisational, economic, and technical interests. Working time adaptations under the proposed rationale would be taken from an empowered individual's perspective,

¹⁷¹ Ana de Miguel, *Neoliberalismo sexual: el mito de la libre elección* (Feminismos, 2016).

allowing them to choose unconstrainedly and genuinely, enhancing their well-being¹⁷² far from any logic that is only concerned about protecting workers as productivity tools or about protecting families only as an essential unit for the production-consumption market. This protection would still take into account, by nature of the labour law system, the companies needs and interests, but from a fair, social and balanced perspective. Lastly, this wouldn't exclude using a gender-based approach as a complementary or underlying rationale, which in fact is very much necessary to address the social justice issues that the just transition is meant to confront and where sustainable social law has a major role.

Nevertheless, it should be noted that, due to the ambivalence of social law, these legal instruments are already helping on tempering the intensity of the productivist mandate, yet they are taking a dead-end path, still far from offering an adequate protection for commodified workers and build a coordinated and coherent response towards sustainable social law, confronting the productivist paradigm.

¹⁷² Corinna Brauner et al. 'Health and work-life balance across types of work schedules: A latent class analysis' (2019) *Applied Ergonomics*, 81

Chapter 2. An overview of the Spanish legal framework: any room for autonomy?

This chapter seeks to give a brief overview to the Spanish legal system to see if any protection of autonomy can be found in the working time regulatory framework. The analysis will focus on an overall analysis of mechanisms related to the protection of non-productive times-spaces to assess their rationale and their compatibility with autonomy.

2.1. An overall analysis of the Spanish labour law framework: the Spanish Royal Legislative Decree 2/2015, Workers' Statute.

The Spanish Royal Legislative Decree 2/2015, Workers' Statute (the "WS") is the main legal norm regarding labour law regulations. Within its first articles, it sets the basic labour rights and duties where we find, in art. 4.1.e) the need to respect the workers' "privacy and due consideration to his dignity". According to ECtHR's interpretation dignity and autonomy are intrinsically linked and some have acknowledged the latter as the "emanation of human dignity"¹⁷³; we have also seen the symbiotic relationship between dignity, autonomy, and human rights¹⁷⁴. A recognition of dignity as including personal autonomy within the chapter of "basic labour rights" would be an important statement towards sustainable social law. However, despite the centrality of dignity within labour relations, not many progresses have been made on its scope and its practical applicability¹⁷⁵. In fact, according to the Spanish Constitutional Court case-law, dignity has been mainly translated to protection against sexual harassment¹⁷⁶, the rights to honour, privacy, and one's image¹⁷⁷ and to non-discrimination¹⁷⁸. Despite that, it also

¹⁷³ Beate Rudolf, 'European Court of Human Rights: Legal status of postoperative transsexuals' (2003) *International Journal of Constitutional Law*, Volume 1, number 4, 719.

¹⁷⁴ Nelleke Kofeeman, '(The right to) personal autonomy in the case law of the European Court of Human Rights (nota opgesteld ten behoeve van de Staatscommissie Grondwet)' (2010), Leiden University, 81.

¹⁷⁵ María Teresa Igartua Miró, and Antonio Ojeda Avilés. 'La dignidad del trabajador en la doctrina del Tribunal Constitucional. Algunos apuntes' (2008) *Revista del Ministerio de Trabajo y Asuntos sociales* 147, 167.

¹⁷⁶ Sentencia del Tribunal Constitucional 224/1993 (Sala Segunda), 20 January 2000 (BOE No 17)

¹⁷⁷ Sentencia del Tribunal Constitucional 85/1992 (Sala Segunda), 1 July 1992 (BOE No 157); Sentencia del Tribunal Constitucional 282/200 (Sala Primera), 27 November 2001 (BOE No 4).

¹⁷⁸ Sentencia del Tribunal Constitucional 161/2004 (Sala Primera), 4 October 2004 (BOE No 270).

referred once to vacation and free development of personality and prohibition of instrumentalisation of individuals: the Constitutional Court case 192/2003, 27 October 2003, that we will analyse later. In any case, despite the intrinsic connection between dignity and autonomy, it is not considered as a basic labour right by the WS, not even mentioned as a related principle. On the other hand, regarding working duties we do find its counterpart: the obligation of workers to “contribute to improving productivity”¹⁷⁹ and by “complying with orders and instructions of the employer in the regular exercises of his faculties”.¹⁸⁰ The latter is not only protected in the labour legislation but as a constitutional right, as public authorities shall guarantee and protect the market economy and “safeguard productivity in accordance with the demands of the economy in general and, where appropriate, of its planning”.¹⁸¹ Certainly, a statement of intent, giving priority to the productivist demands and the need for economic growth without granting, at the same level -or at any- the principle of autonomy with protection to act, not only as a counterbalance of the employer’s prerogatives, but to nourish other provisions throughout the legal text to temper the productivist mandates.

The Spanish labour law regulations are a perfect example of the shift of labour law towards a “law of the employment”,¹⁸² i.e., instrumentalised and deregulated to act as a machine for the creation of productive employment. Accompanied by many measures of flexibility without security,¹⁸³ it has institutionalised precariousness through non-standard forms of work and employer-oriented flexibility. Specifically, working time flexibility has been used as a tool for competitiveness,¹⁸⁴ and the employer manages the working time: a prerogative to irregularly distribute the 10% of the annual working time (art. 34.2 WS), the possibility to set weekly rest biweekly instead (art. 37.1 WS) or the

¹⁷⁹ Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE No 255, 24 October 2015), Art 5 c.

¹⁸⁰ Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE No 255, 24 October 2015), Art 5 e.

¹⁸¹ Constitución Española (BOE No 311, 29 December 1978), Art 45.

¹⁸² Joaquín Pérez Rey and Antonio Baylos Grau, *El Despido o la violencia del poder privado*, (Madrid, Trotta 2009), 35.

¹⁸³ Julia López, Alexandre de le Court and Sergio Canalda, ‘Breaking the equilibrium between flexibility and security: Flexiprecarity as the Spanish version of the model’ (2014) *European Labour Law Journal*.

¹⁸⁴ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 110.

lack of limit for overtime hours if compensated during the next 4 months of their undertaking (art. 35.2 WS).

The protection of working time along the WS is not directly linked to the health and safety rationale that we observed in the WTD, except for the aspects there regulated. However, the Spanish Constitution recognises, in art. 40.2, that public authorities will safeguard “health and safety at work and shall guarantee adequate rest by means of a limited working day”. This implies a complete reinforcement of the health and safety rationale taken by the WTD, to what the same critique that we already developed can be addressed. In any case, it does not exclude a potential protection for autonomy in legal standards of lower hierarchical rank, but it can imply the subordination of the latter to the health and safety postulates. Again, we don’t try to deny the importance of health and safety regulations at work, on the contrary, but we stress the relevance of incorporating autonomy as a main rationale, as we have been arguing along this work.

Throughout the WS we can find, however, many measures that, despite not being based on autonomy, help to temper the productivist mandate by protecting, to certain extent, some non-productive spaces.

For instance, and despite it has been left out for extension purposes, article 20 *bis* of WS provides with protection of the right to privacy in the usage of technological devices, digital disconnection, and privacy with regard of geolocation and surveillance devices, which finds legal development in the *Ley Orgánica 3/2018 de protección de datos y garantía de derechos digitales*. Many scholars have agreed that it overlaps with the right to rest, already recognised, and does not offer further guarantees.¹⁸⁵ In fact, the purpose of this legal act is to “guarantee, outside work, the respect of its resting time, permits and vacations, as well as personal and family privacy”.¹⁸⁶ For the purposes of this work, it does not contribute to the promotion of autonomy, rather puts emphasis on the

¹⁸⁵ Gámez, María Rosa Vallecillo. "El derecho a la desconexión: ¿«Novedad digital» o esnobismo del «viejo» derecho al descanso?." *Revista de trabajo y Seguridad Social. CEF* (2017): 167-178.

¹⁸⁶ Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales (BOE No 294, 6 December 2018), Art 88.

protection of health and safety, specially for telework and remote work, obliging the employer to adopt an internal procedure to regulate its exercise.¹⁸⁷

But there are also other mechanisms that share common traits and protect non-productive spaces; to mention some of them, non-exhaustively: workers are given with some days off as a permit for marriage, change of legal residence, personal and public duty, undertaking of trade union functions, childbirth preparation or caregiving of a sick relative (art. 37.3). Other mechanisms are granted by article 37 such as reduction of working hours for caregiving of a son under 12 years old and to people with disabilities, or to close relatives that can't be self-sufficient.

Despite they are characterised by a space-time where productivity is absent, autonomy does not play a role thereto. Mainly because they have a restricted scope and a rationale that is potentially useful for productivist ends and quite opposed to autonomy. This is, workers can't invoke them as a general right to adapt their working hours on regular basis as an expression of the value of their capacity to conduct their life, but instead they are limited to a very specific occurrence or situation. In most of the cases, to caregiving purposes or even health and safety -when it concerns maximum limits on working hours or rest periods, as consequence of the implementation of the WTD. In any case, this implies that autonomy is not taken as rationale valued in itself to justify the protection of those spaces, rather the latter are protected only for considerations linked to attend family responsibilities and non-self-sufficient relatives, as we could already envisaged in the WLBD. On the other hand, some of the mechanisms allow for the determination of its enjoyment to the employee *ex art. 34.7*. Others, rely on the "productive and organizational necessities of the companies",¹⁸⁸ to what a mandatory prior notice of 15 days is not considered enough for the employer to arrange it.

¹⁸⁷ Pilar Charro Baena, 'La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa' in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 108.

¹⁸⁸ Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE No 255, 24 October 2015), Art 34 7.

In general, most of the mechanisms in WS are related to caregiving of dependent relatives or children, where autonomy does not play a role as a valuable principle. This is, the capacity of workers to put their personal interests (related to self-development, well-being, self-fulfilment...) before the productivity demands of the company is not considered as being valuable. Rather, the mechanisms seek to protect specific situations as caregiving that allow to keep the unstoppable wheel of economic growth and production, while allowing to partially take care of relatives in need of care. We will briefly analyse some of the relevant measures where non-productive spaces are granted to see whether we can find a rationale other than caregiving or health and safety.

2.2. The Royal Decree 6/2019 and art. 34.8 of the Spanish Statute of Workers: conciliation of family life.

As we have seen, the Spanish legal framework is a good example of the productivist embedment within labour law and how it has been instrumentalised and deregulated to act as a machine for the creation of productive employment. Specifically, working time flexibility has been used as a tool for competitiveness,¹⁸⁹ and the employer manages has a broad prerogative on managing working time.

Working time and the possibilities for work-life balance are strictly related. To this end, we will focus now on the Royal Decree 6/2019 (the “RD”) that modified art. 34.8 of WS, regarding the reconciliation of work and family life:

Before the adoption of the RD workers had a chance to adapt the duration and distribution of working hours for family life reconciliation purposes, but its exercise depended on collective or individual agreements, subordinating its effectiveness to the agreed -if any- terms. After the RD it is recognised under art. 34.8 WS, a right, indeed, but only to “request the adaptations on the duration and distribution of the working

¹⁸⁹ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 110.

day”¹⁹⁰ what includes a mandatory negotiation of maximum 30 days where both parties have to negotiate in good faith. After the referred period, the employer must give either an alternative or deny the request, alleging “objective reasons”.¹⁹¹ Also, art. 34.8 WS is only applicable for reconciliation of work and family life when having children under 12 years old.

Again, despite the relevance that working time has on private life and one’s autonomy, no mention of the latter is found. In fact, we argue that the way it has been adopted excludes autonomy from the equation, diminishes its value and jeopardises the effectiveness of its already narrowed scope:

Firstly, despite recognising it as a right, it is not directly confrontable to the employer,¹⁹² since it only covers the right to “request” to the employer; in turn only recognising an “expectative of a right”¹⁹³ that is channelled through a negotiation process. Secondly, the exercise of the right requires for the employee to present a “reasonable and proportionate request”.¹⁹⁴ Therefore, the right to adapt the working time depends, solely, on the existence of an objective assumption, i.e., having children under 12 years old or family to take care of and the impossibility to do so while keeping with a productive employment. This request must take into account employer’s needs as well, so the “reasonable and justified” refers to the latter. The narrowed scope of the measure limits the effectiveness of the conciliation, excluding other aspects such as private life. One could understand that the regulation implies that a request to adapt one’s working hours to personal priorities would allow be “unreasonable and

¹⁹⁰ Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE No 255, 24 October 2015) Art 34 8.

¹⁹¹ Maria José Ramos, ‘El derecho a solicitar la adaptación de la jornada laboral’ (*CMS Law, Tax, Future* July 2019) <https://cms.law/es/esp/publication/el-derecho-a-solicitar-la-adaptacion-de-la-jornada-laboral#:~:text=Desde%20el%208%20de%20marzo,la%20vida%20familiar%20y%20laboral> accessed 1 July 2023.

¹⁹² Carmen Viqueira Pérez, ‘Límites a la adaptación de jornada para la conciliación de la vida familiar (art. 34.8 ET)’ (2021) *Revista de Jurisprudencia Laboral* No 4.

¹⁹³ Pilar Charro Baena, ‘La reformulación del concepto de tiempo de trabajo desde el enfoque de la transición justa’ in Consuelo Chacartegui Jávega (ed), *Condiciones de trabajo decente para una transición ecológica justa* (Tirant lo Blanch, 2021), 111.

¹⁹⁴ Sentencia del Tribunal Supremo 132/2023 (Sala de lo Social, Sección 1) 10 January 2023 (appeal 2166/2021)

disproportionate” instead, since one’s interests and social development other than at work and caregiving, are not valued. In addition to its narrow scope, the interpretation of the Spanish Supreme Court limits its effectiveness even more by interpreting that the employee must demonstrate the impossibility for another familiar to fulfil the role of caregiver at that time.¹⁹⁵ Conditioning the exercise of a right to an unattainable need to conciliate, collides frontally with the fact that, at the same time, it is recognized as a right of individual ownership.¹⁹⁶ Thirdly, the employer, despite being obliged to undertake a negotiation period, can deny the request on “objective reasons”,¹⁹⁷ what entails that the employer must “deploy a minimum argumentative and probative activity”,¹⁹⁸ regarding organizational and economic reasons, that must be indicated in a specific manner.¹⁹⁹

In conclusion, art. 34.8 WS is translated to a right to obtain a negotiation procedure in good faith *vis-à-vis* the employer, not a directly confrontable right to enjoy an adaptation or reconciliation measure. Thus, mechanisms of conciliation and protection of non-productive spaces based in caregiving are not suitable to hamper the productivist imperative of the labour relation neither the (in)equilibrium of power with the employer, but rather offer a worker with the possibility to keep engaged in the workforce without neglecting the basic needs of closest relatives. This legal approach implies that personal development, personal interests and priorities, socialization or self-fulfilment of workers is considered as irrelevant by the legislator when it does not have a productive outcome. Again, autonomy would act as the antithesis of the productivist ideal to give value to these personal interests, priorities, and self-fulfilment that we referred, and therefore conferring a right directly confrontable to the employer’s economic and organizational - and unsustainable- needs, towards a sustainable development of both workers and social law.

¹⁹⁵ Viqueira Pérez C, ‘Límites a la adaptación de jornada para la conciliación de la vida familiar (art. 34.8 ET)’ (2021) *Revista de Jurisprudencia Laboral* No 4.

¹⁹⁶ Eduardo Rojo Torrecilla, ‘Interpretación integradora. del art. 34.8 LET: adaptación de la jornada de trabajo a la conciliación de la vida laboral y familiar’ (2021) *Revista de jurisprudencia laboral*, 7.

¹⁹⁷ Sentencia del Tribunal Supremo 4143/2022 (Sala de lo Social, Sección 4) 10 November 2022 (appeal 4694/2020).

¹⁹⁸ Sentencia del Tribunal Supremo 13/2021 (Sala de lo Social, Sección 1) 21 January 2021 (appeal 1169/2019), FJ 1.

¹⁹⁹ Sentencia del Tribunal Supremo 13/2021 (Sala de lo Social, Sección 1) 21 January 2021 (appeal 1169/2019), FJ 1.

In any case, we can envisage through the Spanish and EU regulations on working time that they are based on health and safety, as necessary means to maintain the productive capacity of workers, and in caregiving, as a necessary means to maintain the family functioning, as a relevant economic unit in the development of production-consumption social patterns.

2.3. Voluntary leave *ex art. 37 Spanish Statute of Workers: a way forward for autonomy?*

A very particular institution within the Spanish legal system is the voluntary leave *ex art. 46 WS*. It confers the right to any worker with a seniority of over a year to apply for a leave for a period between 4 months and 5 years, keeping a right to a preferential reinstatement during that interval by giving a notice a month in advance.²⁰⁰ The reinstatement, however, is subjected to the existence of a vacancy in a similar job, or, alternatively, to another one in the same company. During that period, the contract is not terminated but interrupted, since the worker always holds a reinstatement possibility. And, in fact, given the moment of reinstatement, in case of negative of the employer other than the lack of vacancies, the situation is considered a wrongful termination;²⁰¹ in Spain, this is mainly translated to relatively low economic compensation, which grants the employer with a broad prerogative on dismissal that disregards the social importance of work for any human being.²⁰²

We insist on the particularity of this institution since it is directly confrontable to the employer, i.e., the worker can unilaterally oblige the employer to accept the exercise of

²⁰⁰ María Rosa Vallecillo Gámez, 'Excedencia voluntaria, despido improcedente y reconocimiento de prestaciones: a propósito de la STS 14 marzo 2019' (2019) *Revista de Derecho de la Seguridad Social, Laborum*, 143.

²⁰¹ María Rosa Vallecillo Gámez, 'Excedencia voluntaria, despido improcedente y reconocimiento de prestaciones: a propósito de la STS 14 marzo 2019' (2019) *Revista de Derecho de la Seguridad Social, Laborum*, 143.

²⁰² Joaquín Pérez Rey and Antonio Baylos Grau, *El Despido o la violencia del poder privado*, (Madrid, Trotta 2009), 35.

the right.²⁰³ So far, it is the only institution we have found that could be argued to promote one's autonomy, or to use it as a legal ground: firstly, it is directly confrontable to the employer, and, secondly, it allows for a protection of a non-productive spacetime for any possibility, i.e., giving value to the devotion to any personal interests or priorities, with short seniority requirements.

On the other hand, it does not include any income security, neither the regular wage, nor the access to social security benefits to protect a minimum income floor. But this is rather an expected scenario under a productivist-based economic system: barely any exceptions or alternatives to devote to personal interests that are detached from productivity, and when recognized, either they have a very narrowed rationale and application, or they are not accompanied with an income security. We already saw in the first part how relevant it is for an effective enjoyment of autonomy to have guaranteed an economic security income.²⁰⁴

Thus, it is a rather forgotten institution that has had barely any legal and jurisprudential development over the last decades, and due to its ambiguity, it entails issues related to the negative of the employer to the reinstatement. However, we believe this figure is worth exploring for an ulterior reformulation on working time, due to its peculiar characteristics that assimilates in certain way to what autonomy aims to achieve within the social law framework; mainly, confronting the productivist ideal, the commodification of work and the unbalanced working relationship.

²⁰³ Sentencia del Tribunal Supremo 3678/2022 (Sala de lo Contencioso, Sección 4) 17 October 2022 (appeal 6526/2020); Sentencia del Tribunal Supremo 2237/2022 (Sala de lo Social, Sección 1) 31 May 2022 (appeal 134/2019).

²⁰⁴ Robert E. Goodin, 'Work and welfare: Towards a post-productivist welfare regime' (2001) *British Journal of Political Science*, 27.

2.4. The Spanish Constitutional Court and autonomy at work: Case 192/2003. The “bogus autonomy” or autonomy to produce.

To conclude with the overview of the Spanish working time regulation in our endeavour to find any protection for autonomy, we will refer to a pronouncement of the Spanish Constitutional Court.

The case n. 192/2003 of 27th October from the Spanish Constitutional Court addressed the situation of a worker that was dismissed on the basis of a transgression of the contractual good faith, given the fact that he had been working for a different company during his vacation period.²⁰⁵

Paid vacations have been configured as a right-duty,²⁰⁶ i.e., an obligation for the worker that links his right to vacation (for rest purposes), with the fidelity to his employer. Proof of this is articles 38 and 58.3 WS that forbids the trade between enjoyment of the period for economic compensation, or the prohibition of sanctions that consist in reduction or annulment of resting periods. We disagree with the conception of vacation merely as a rest period related to health and safety, as we have been mentioning during this work, due to its implications on supporting a productivist rationale. Despite that, that conception has been proven useful to protect minimum floors, but not in this case:

The Constitutional Court argued that the conception of annual vacation period as rest time “whose only purpose is the recovery of energy to resume the work performance, entails reducing the worker as a mere factor of production and neglect (...) his freedom during that period to develop his own personality in the way he deems appropriate”.²⁰⁷ It then states that the referred conception of vacation is “incompatible

²⁰⁵ María Teresa Igartua Miró, and Antonio Ojeda Avilés. ‘La dignidad del trabajador en la doctrina del Tribunal Constitucional. Algunos apuntes’ (2008) Revista del Ministerio de Trabajo y Asuntos sociales 147, 164.

²⁰⁶ María Teresa Igartua Miró, and Antonio Ojeda Avilés. ‘La dignidad del trabajador en la doctrina del Tribunal Constitucional. Algunos apuntes’ (2008) Revista del Ministerio de Trabajo y Asuntos sociales 147, 165.

²⁰⁷ Sentencia del Tribunal Constitucional 192/2003 (Sala Primera), 27 October 2003 (BOE No 283), FJ 7.

with the constitutional principles in art. 10.1 stated by the Spanish Constitution (refers to dignity and free development of personality)",²⁰⁸ considering that "dignity must remain unaltered whatever the situation for a person may be, constituting an "invulnerable minimum that every legal norm must ensure".²⁰⁹ According to the Constitutional court, then, respect for private life (as includes free development of personality), prohibits an employer to dismiss a worker to perform a job for another employer, on the basis that it would affect his dignity and personal development, as vacation period is not merely a rest period.²¹⁰ This is unprecedented.

Firstly, this poses an incongruity: a worker can't waive to his rest time to work for his employer under the perception of an economic compensation -under arguments of health and safety- but he can waive that right to work for a different employer, in exchange of an economic perception.²¹¹

In both cases, it is most likely that the worker is coerced or forced to do so, what would directly confront his fundamental rights and the prohibition of forced labour. Even in the case of a voluntary waive, the conception of voluntariness or freedom that the Constitutional Court takes, bases in a negative-liberal autonomy. This is, it considers that a decision or action is legitimate when it is freely taken, i.e., not expressly coerced or highly influenced. However, in most of the cases the effective enjoyment of the right to paid vacations is one of the most valued off-time periods during the year; both for rest purposes, but mainly because it allows to devote to any activity that one values as important for his self-development or interests. Thus, one would strangely waive its enjoyment for an economic compensation, less it be to actively choose to work for another company, giving up a valuable period to both rest and enjoy of one's hobbies and interests. In that equation, the availability of necessary economic resources to

²⁰⁸ Sentencia del Tribunal Constitucional 192/2003 (Sala Primera), 27 October 2003 (BOE No 283), FJ 7

²⁰⁹ Sentencia del Tribunal Constitucional 192/2003 (Sala Primera), 27 October 2003 (BOE No 283), FJ 7.

²¹⁰ José Sánchez Pérez, 'La tutela de los derechos sociales a través de la jurisprudencia del Tribunal Constitucional' in Eva Garrido Pérez (ed), *Constitución Española y Relaciones Laborales ante el actual escenario social y económico. Comunicaciones* (Junta de Andalucía, Consejo Andaluz de Relaciones Laborales, 2013)

²¹¹ María Teresa Igartua Miró, and Antonio Ojeda Avilés. 'La dignidad del trabajador en la doctrina del Tribunal Constitucional. Algunos apuntes' (2008) *Revista del Ministerio de Trabajo y Asuntos sociales* 147, 165.

guarantee an adequate standard of living is crucial. And we have already seen in this work that the lack of availability of resources -specially economic- severally restricts the effectiveness of autonomy, in its positive-relational aspect;²¹² this is, it hampers a free and genuinely decision-making process if the exercise of the critical thinking process can't be translated into a practicable and effective action. Therefore, favourable means and resources are fundamental for one's autonomous decisions, and, broadly, as means to achieve self-development and one's best potential.²¹³

We argued as well that the defence of this positive autonomy legitimised the paternalist intervention of states to ensure a minimum living conditions and economic resources and to procure for healthy and constructive social relationships, key for one's autonomous development, this is, those that are not coercing, manipulating, or despising the individual, rather allowing for his creative and wholesome development.

Therefore, a post-productivist conception of autonomy would lead us to prohibit situations where an employee that holds an unprivileged or marginalised status wants to undertake work for another employer during his vacations, or as the WS already forbids, to prohibit to work for the same employer - not only because of health and safety reasons, but for a lack of genuine autonomous decision. In fact, this conception of autonomy, as we already argued, would also allow us to confront the employer with a right to enjoy non-productive spaces for personal development.

We argue that the defence of the liberal autonomy to legitimise the referred scenario is, in fact, a gross violation of one's autonomy, dignity and right to private life. In effect, the fact that we have barely any traces of autonomy through the analysis of different legal texts, but we do find it here, under a liberal conception, points to a willingness to defend a "bogus autonomy" or an "autonomy to produce". With this, we refer to the instrumentalisation of the liberal conception of autonomy for productivist purposes. This

²¹² Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 Am U J Gender Soc Pol'y & L 111, 122.

²¹³ Jaunius Gumbis, Vytaute Bacianskaite and Jurgita Randakeviciute, 'Do Human Rights Guarantee Autonomy?' (2008) Cuadernos de la Cátedra Fadrique Furió Ceriol 77, 81.

is, the decision of a worker is only considered as relevant to put it before the companies' interest -unilaterally and without prior notice, as in this case - when it's oriented to a contribution in productivity and economic growth. Then, it also outweighs, apparently, the health and safety minimum protections on working time, as the right to paid vacation. Anyhow, different conceptions of the same legal principle, lead to different outcomes, as we have seen in this pronouncement of the Spanish Constitutional Court.

In short, an example of the perversion of the system of labour rights and guarantees that follows the deregulating tendency of labour law and that orient it as an employment instrument,²¹⁴ institutionalising precariousness of workers as a commodity that an employer can dispose at will, as an irrelevant element in the unstoppable wheel of production and economic growth.

²¹⁴ Joaquín Pérez Rey and Antonio Baylos Grau, *El Despido o la violencia del poder privado*, (Madrid, Trotta 2009) 35

CONCLUSIONS

By fostering the notion of full productive employment, social law has vectorised the needs of capitalist-productivist societies that have entailed a massive exploitation of natural resources to the point of altering its most basic biological processes, placing the habitability of the Earth at stake. To effectively address climate change's adverse impacts, we cannot solely place the attention on decarbonisation processes or the productive system, but we need to holistically address its effects, that extend beyond the environmental-economic aspect to social justice matters. To that end, re-assessing the social law institutions, embedded to the core with the productivist-capitalist ideals, becomes imperatively urgent. The ILO, UN and EU need to refocus their agendas and on the Decent Work postulates but abandoning their *green deal approach* and their feverish position on sustained economic growth and unleashed productivity as welfare indicators.

Aiming towards a sustainable social law implies decoupling from resource usage, disentangling from the productive paradigm and from the economic growth postulates, seeking to contribute to socially and environmentally sustainable societies. To that, we have argued that four measures are crucial: firstly, the promotion of a public-social notion of work, reinforcing social and collective spheres and confronting the de-regularisation of labour law and the collective de-institutionalisation processes; secondly, taking a shift from "how" work is developed towards "who" develops it and its well-being, i.e. a promotion of welfare at work and sustainable development of workers, conferring value to their interests, priorities, socialisation and personal development; thirdly, the promotion of non-productive activities and non-productive spacetimes as basic notions to disentangle the right to work from its notion of commodity and its instrumental value as a source of income, ensuring that work is both not necessarily productive and freely chosen; lastly, reassessing the social security system for it to ensure a security of income and minimum living standards, to guarantee a proper scenario for the aforesaid. The principle of autonomy, understood from a positive-relational conception, underlies in the aforesaid actions and, more broadly, in the main objectives of sustainable social law, as a cornerstone for the normative action that

pursues its development, therefore, key in disentangling social law from productivism, in de-commodifying work(ers) and in balancing the employer-employee relationship.

In the current legal framework this conception of autonomy can be already fit within the right to private life *ex art. 8 ECHR*, under the broad interpretation that ECtHR consistently uses. This could imply positive obligations for states to adopt a legal framework to grant non-productive spaces and firstly, to give value to personal development, self-fulfilment, socialisation, and personal interests; secondly, to promote “constructive social relations”, and thirdly, to ensure economic resources and decent living standards for an adequate development of autonomy and well-being of workers.

A multilevel overview of the EU and Spanish legal systems on working time has lead us to the conclusion that autonomy is not valued thereto, and all the protection given to workers regarding working time goes hand in hand with health and safety (as necessary means to maintain the productivity of commodified workers) or with caregiving (as necessary means to keep the society structure and for the importance that families have in the consumption-production model). These rationales do not grant autonomy with appropriate value, since they only allow for the protection and adaptation of working time in narrowed specific cases (health and safety and caregiving, mostly) and still keep a disproportionately powerful prerogatives to the employer, even to the point of limiting its effectiveness.

In conclusion, we argue that is crucial to take the principle of autonomy as cornerstone for the normative action in the development towards sustainable social law, operating as a guarantor of de-commodification of social law, disentangling it from productivism and balancing the employment relationship. It is now turn for the international actors and states action: a crystallisation of the productivist paradigm, economic growth and inequality-based societies or a deep, effective transformation towards sustainable, equity-based societies?

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