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**Activation Policies for
the Unemployed, the Right
to Work and the Duty to Work**



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INTRODUCTION

Activation Policies for the Unemployed, the Right to Work and the Duty to Work: Which Interactions?

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“The freedom of [society’s] weaker groups, such as the unemployed, is a benchmark for the degree of real freedom for all citizens.”¹

Since the 1990s and the 2000s, social protection systems in European and North American countries have all experienced a turn towards activation.² This turn consists of the multiplication of measures aimed at bringing those who are unemployed and in receipt of social benefits closer to participation in the labour market.³

It must be stressed from the outset that the link between social security and the labour market has been, since their very foundation, a structural feature of all national social protection systems. Thus, the granting of unemployment benefits has always been conditioned upon compliance with certain legal requirements such as being available for work, accepting any suitable job offer and making an effort to find employment. Generally speaking, all social protection systems are characterised by a form of subsidiarity of the intervention of the community with respect to the steps that people can accomplish by themselves to provide for their own subsistence. Because of this subsidiarity, social benefits have always displayed a more or less “conditional” nature across countries and over

¹ J. Van Langendonck, “The Social Protection of the Unemployed”, *International Social Security Review*, Vol. 50, No. 4, “Unemployment and Social Security”, 1997, p. 40.

² For a comparative overview, see for example J.-C. Barbier and W. Ludwig-Mayerhofer, “The Many Worlds of Activation”, *European Societies*, Vol. 6, No. 4, 2004, pp. 423-436; A. Serrano Pascual and L. Magnusson (eds.), *Reshaping Welfare States and Activation Regimes in Europe*, Brussels, P.I.E.-Peter Lang (Work & Society), 2007; W. Eichhorst, O. Kaufmann and R. Konle-Seidl (eds.), *Bringing the Jobless into Work? Experiences with Activation Schemes in Europe and the US*, Berlin, Springer, 2008.

³ For this definition, D. Dumont, *La responsabilisation des personnes sans emploi en question*, Brussels, La Charte, 2012, p. 421.

different periods of time.⁴ However, contemporary activation measures are intended to develop and strengthen the links between social security and the labour market, so as to increase transitions from the first to the second.

Though these measures may take the form of improving the assistance provided by public employment services, developing personalised support for jobseekers or investing in vocational training, they consist most often in strengthening the conditions that must be met in order to receive social benefits. Consequently, the intensity of active job searching to which unemployment and social assistance benefits are subjected tends everywhere to be reinforced through an ever tighter jobseekers monitoring system. Similarly, in many social protection systems, the notion of suitable employment, which defines the section of the labour market for which jobseekers must show their availability, is undergoing a process of flexibilisation, in order to compel those concerned to lower their expectations or to accept the first job that comes their way. In some countries, especially Anglo-Saxon ones, social benefits recipients are even required to perform socially useful work in order to continue receiving their benefits – it is workfare. Besides these various measures, the activation of beneficiaries is also sometimes embodied by a reduction in both the amount of social benefits and the period of time for which they are granted.

It is in this well known general context that the authors involved in this book wanted to take a closer look at the relationship between activation policies for the unemployed and the coupling of the right and the duty to work. If one understands how activation measures are likely to increase transitions toward the labour market – which leaves open the question of the quality of the jobs to which access is thereby provided⁵ – we can also make the assumption that these measures may, particularly when they are marked with the seal of coercion, hinder or dramatically reduce the right to freely chosen work.⁶ In such circumstances, the realisation of

⁴ J.-C. Barbier and M. Knuth, “Of Similarities and Divergences: Why There Is No Continental Ideal-Type of ‘Activation Reforms’”, Paris, Université Paris I Panthéon-Sorbonne, Centre d’économie de la Sorbonne, *CES Working Papers*, No. 2010-75, 2010, p. 4; D. Dumont, “Activation rime-t-elle nécessairement avec stigmatisation?”, *Droit et Société*, No. 78, 2011, pp. 449-456.

⁵ On this issue, see among others S. Borelli and P. Vielle (eds.), *Quality of Employment in Europe. Legal and Normative Perspectives*, Brussels, P.I.E.-Peter Lang (Work & Society), 2012.

⁶ In this sense, see the precursory warnings, on the continental side, of J. Freyssinet, “Plein emploi, droit au travail, emploi convenable”, *Revue de l’IRES*, No. 34, 2000, pp. 27-58 and J. Van Langendonck, “De ‘actieve’ welvaartsstaat”, in B. Raymaekers and G. Van Riel (eds.), *Hoe dichtbij is de toekomst?*, Leuven, Universitaire Pers Leuven, 2005, pp. 241-254. Meanwhile, certain bodies monitoring compliance with

the “right to work”, which is often the stated aim of those who promote activation, tends in practice to be reduced to an increasing pressure being exerted on the unemployed. In this case, it is actually the duty to work that is particularly reinforced.

The following words clarify this hypothesis by reinscribing the turn towards activation and its impact on the coupling of the right and the duty to work in a diachronic perspective. This will be followed by a brief presentation of the structure of the book, of which two transversal features are multidisciplinary and a combination of Anglo-Saxon and Francophone traditions of thought.

Activation Policies Facing the Coupling of the Right and the Duty to Work

Since modernity, work in our societies has had the moral status of both a duty and a right (A.). But it was not until the establishment, in the 20th century, of social protection systems, that this duty and this right received a precise legal significance, and their respective extents were thus determined (B.). It is this balance that mass unemployment and contemporary activation policies for the unemployed have disturbed, reopening the old debate regarding societal arbitration that needs to be settled between the right and the duty to work (C.).

A. Work in Modern Societies, a Duty as much as a Right

Modernity has invested the work value with multiple functions. It is the coexistence of these functions that explains why work has been considered ever since, on ethical grounds, both as an individual’s duty and as a right *vis-à-vis* society.⁷

the international conventions that proclaim the right to work also began to formulate warnings, noting that the development of activation measures is likely to negatively impact the right of social benefits recipients to freely choose their employment. See, on the side of the Council of Europe, European Committee of Social Rights, *Conclusions 2004, on the Application of Article 1, § 2 of the 1961 ESC*, Sweden, 31st of April 2004 and *Conclusions XVI-2, on the Application of Article 1, § 2 of the 1961 ESC*, Latvia, 30th of June 2004; and, on the side of the International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *General Survey Concerning Social Security Instruments in Light of the 2008 Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 100th session, 2011, pp. 93-95, especially § 228.

⁷ On this evolution correlated to the emergence of modernity, see D. Média, *Le travail, une valeur en voie de disparition*, Paris, Aubier (Alto), 1995, chapters III et IV. See also J. Elster, “Is There (or Should There Be) a Right to Work?”, in A. Gutmann (ed.), *Democracy and the Welfare State*, Princeton, Princeton University Press, 1988, p. 57.

On the one hand, work is collectively framed as the main vector for social cohesion and peace. It is indeed associated with the promise of making relations more peaceful through the increase of wealth and well-being. In this perspective, individuals are seen as interdependent and complementary in the act of production: they all depend on the work of others in order to meet their own needs. From the moment that society in its entirety revolves around work, each of its members has a moral duty to participate, through his work, in increasing productive activity and, more generally, in the proper functioning of society.

At the same time, work is also seen as an essential human dimension. First, historically, for its instrumental function, i.e. as a way for individuals to earn income and a place in society. But later on also for its intrinsic function, i.e. as a good in itself, allowing everyone to express their individuality and to blossom. Adorned with these functions, work integrates the sphere of human rights. Without work, the most fundamental of all rights, the right to life, remains devoid of effectiveness – be it that this right is seen as the right to subsistence or as the right to personal development. That is why the moral duty to work that weighs on individuals, on behalf of the maintenance of social cohesion, is doubled by a reciprocal ethical requirement on the part of society: that of ensuring to all its members the effective possibility of finding a job in which they can blossom.

B. The Construction of Social Protection Systems, or Achieving a Balance between the Right and the Duty to Work

Obviously, the various functions assigned to work do come into tension. On the one hand, employment must be freely chosen in order to enable the individual to deploy his skills and to achieve personal development. But, on the other hand, social cohesion requires individuals to set aside, at least to a certain extent, their personal aspirations, because it is, from this perspective, on everyone's participation in productive activity that the proper functioning of society depends. Our social representation of work thus appears marked by the conflicting demands of freedom of choice, motivated by the ideal of personal emancipation, on the one hand, and collective constraint, justified by the concern of general interest, on the other.

The practical realisation of freely chosen full employment therefore represents an oxymoron. Since the beginning of the 19th century, it was constantly confronted with the following dilemma. If public authorities intervene to provide work to each member of society, they risk heavily negating individuals' free choice of employment, and strengthening, in an excessively coercive manner, their duty to work (legal constraint). But

if public authorities refrain from intervening, in the name of preserving freedom of choice, then the right to access the labour market and to freely choose one's professional orientation is at risk of remaining purely formal, so that in the end numerous individuals will be *de facto* coerced, in order to ensure their survival, into accepting any work conditions (economic constraint). Liberals – proponents of *laissez-faire* – and socialists – supporters of a planned economy – competed concerning these arguments for nearly two centuries, without being able to escape the dilemma.⁸ Both camps were claiming to be proponents of the right to work and accusing the other of wanting to reduce this right to a mere duty.

At the end of the First World War, and even more so at the end of the Second World War, Western European and Northern American countries succeeded in overcoming this impossible equation and in easing the hitherto insoluble tension between the right and the duty to work. The gradual conversion to Keynesianism and the parallel construction of social security systems enabled Western states to flirt with full employment while protecting the freedom to choose a job, according to the way advocated by Beveridge in his famous book *Full Employment in a Free Society*.⁹

Full employment achieved in the economic field actually gave substance to the right to work. Throughout the post-war boom, a very high proportion of the workforce had a job, and even a stable job. In addition, individuals who were temporarily deprived of work were supported through social security while they were searching for a new job. The right to unemployment benefits thus appears to be a substitute for the right to work. However, this right is not unconditional. It carries within it an expression of the duty to work that individuals have *vis-à-vis* society, since the granting of benefits is conditional upon being available for work. Only people who are and who remain involuntarily deprived of work have the right to be compensated. But the duty to work – and this is how the balance was achieved – is itself circumscribed,

⁸ For a detailed analysis of the debates around this issue in the French National Assembly in 1848, see F. Tanghe, *Le droit au travail entre histoire et utopie*, Brussels-Florence, Publications des Facultés Universitaires Saint-Louis, 1989. On the similar political battles between states of the Eastern bloc and states of the Western bloc that took place a century later, during the elaboration of the Universal Declaration of Human Rights, and then of the International Covenant on Economic, Social and Cultural Rights, see, respectively, J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent*, Philadelphia, University of Pennsylvania Press, 1999, pp. 157-190 and M. Craven, *The International Covenant on Economic, Social, and Cultural Rights. A Perspective on its Development*, Oxford, Clarendon Press, 1995, pp. 194-203.

⁹ W. Beveridge, *Full Employment in a Free Society*, London, Allen & Unwin, 1944.

because unemployment compensation systems legally limit the general condition of availability for work to jobs that are considered suitable and to individuals deemed able-bodied. In doing so, they mitigate the economic obligation to reintegrate into the labour market and provide some effectiveness to the right to freely chosen work.

Thus, within social protection systems, a compromise is made between the right and the duty to work, and therefore between the affirmation of freedom of choice as a condition of the possibility of personal development and the imposition of a certain constraint on behalf of social cohesion. Of course, each national system of social protection shapes this compromise in its own manner. It is in this respect that these systems are, to quote Esping-Andersen's famous analysis, more or less "decommodifying": it is a matter of degree.¹⁰ Nevertheless, despite this diversity, every system contains a surpassing of the opposition between the liberal and socialist conceptions of the right to work that competed throughout the 19th century and the beginning of the 20th. Legally, the right to work realised by Keynesianism and social security is indeed not reduced to the mere formal freedom, proclaimed by liberals in response to corporatism, to exercise a profession. But it also does not take the form, once considered necessary by socialists in order to actually achieve full employment, of providing work to each individual through a planned economy.

In its post-Second World War version, and as it was enshrined in the international human rights instruments, the right to work legally consists of two sides: on the one hand, the (positive) right of access to the labour market and to have a job, embodied by Keynesian macroeconomic policies and the supplementary right to unemployment benefits; on the other hand, the (negative) right to free choice of employment, guaranteed by the prohibition of forced labour and the construction of the concept of suitable employment. The former corresponds to the right to work in the strict sense, the latter to what is usually called, at least in the French tradition, the "freedom of work" (*liberté du travail*). In legal terms, it should be noted that the international conventions consider these two sides, positive and negative, as two inextricably linked facets of a single right.¹¹

¹⁰ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge, Polity Press, 1990.

¹¹ See Article 23, § 1 of the Universal Declaration of Human Rights ("Everyone has the right to work [and] the right to free choice of employment"); Article 6, § 1 of the International Covenant on Economic, Social and Cultural Rights (the right to work is defined as the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts"); the preamble to the ILO Convention No. 122 of 9 July 1964 Concerning Employment Policy (reference is made to the need for an "economic expansion on the basis on full, productive and freely chosen employment"); the preamble

C. Activation Policies for the Unemployed: What Impact on the Relationship between the Right and the Duty to Work?

The emergence of mass unemployment in our societies, following the crisis of de-industrialisation in the 1970s, has deeply shaken the balance between the right and the duty to work achieved during the post-war boom. With the disappearance of full employment, the right to work in its positive dimension is hardly ever fulfilled. Or more accurately, it is reduced to the (in principle) supplementary right to unemployment benefits in the absence of suitable employment, or even to the right to means-tested social assistance for those unemployed individuals who either could not qualify for contributory benefits or have exhausted their benefits. As long as unemployment was reduced to its frictional component, the granting of benefits to individuals temporarily deprived of a job was enough overall to protect their freedom to choose their employment: the unemployed were compensated during the few months they needed to find a job that corresponded to their qualifications. But with the transformation of unemployment into a structural and long or very long-term phenomenon, the guarantee of financial support from social security can no longer effectively secure the right to freely chosen work.

It is in this context that, since the 1990s and the 2000s, a broad consensus has gradually been reached in Western countries: social security systems cannot limit themselves to ensuring the financial autonomy of unemployed individuals out of the labour market. They must also play the role of a springboard into employment. This is viewed as necessary for the maintenance of social cohesion, which depends on the widest possible participation of the population in the labour market. It is viewed as necessary too for the achievement of personal development and self-realisation for the victims of underemployment, since although the payment of social allowances allows them to provide for their subsistence, it does not offer the virtues usually associated with work.

of the ILO Convention No. 168 of 21 June 1988 Concerning Employment Promotion and Protection against Unemployment (reference is again made to “the promotion of full, productive and freely chosen employment”); Article 1, § 1 and 2 of the European Social Charter (“With a view of ensuring the effective exercise of the right to work, the Parties undertake to accept as one of their primary aims and responsibilities the achievement and maintenance of a as high and stable level of employment as possible, with a view to the attainment of full employment” and “to protect effectively the right of the worker to earn his living in an occupation freely entered upon”). *Adde* Committee on Economic, Social and Cultural Rights of the United Nations, “General Comment No. 18: The Right to Work”, 35th session, 24 November 2005, E/C.12/GC/18, § 1 (“The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community”).

Since then, countries have been reforming their social protection systems in order to develop activation measures for social benefits recipients. It is known that the nebula of activation covers a wide range of measures – from skills training and paid internships to the obligation to carry out free community service, and including more or less of an increase in the coercion exerted on social benefits recipients. Such measures are now commonplace in unemployment insurance and social assistance systems. Traces of the activation logic are also beginning to be seen in programmes dealing with work disability.

Because of their heterogeneity, these measures have widely varying impacts on the balance between the right and the duty to work. When they consist in supporting professional reinsertion, and while they are not accompanied by a tightening of the rules governing compensation, they can help to give greater effectiveness to the right to work, understood in the sense of the right to access a freely chosen work. Contrary to a recurrent analysis,¹² we indeed do not believe that activation policies are *per se* synonymous with authoritarian re-commodification of social benefits recipients. In addition to the fact that, as we have pointed out, social security systems have always maintained strong links with the labour market, activation policies may seek to strengthen these links while preserving, for the unemployed, a certain leeway and a certain autonomy in relation to the market.

But it is likely true that in fact, because of the strong tendency to emphasise above all the duties assigned to allowances recipients and at the same time to reduce the extent of social benefits, activation often tends to restrict the individual freedom to determine one's professional orientation. As has been said, the hypothesis that led to this book is that this exacerbation of coercion, because it is done at the expense of the negative facet of the right to work, i.e. the possibility for those concerned to assert their personal aspirations, reduces the right to work essentially to a duty to work. In this case, we can speak of a re-commodification of the unemployed.

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Based on this hypothesis, the contributors to the present book have sought to highlight from different angles the relationship between activation policies for the unemployed, the right to work and the duty to work.

The book is structured in four parts. The first offers an historical and philosophical perspective on the issue. To begin with, courtesy of

¹² In this vein, see typically I. Lødemel and H. Trickey (eds.), *'An Offer You Can't Refuse'. Workfare in International Perspective*, Bristol, Policy Press, 2001.

Fernand Tanghe, we are taken back to the very rich and informative debates that, in the middle of the 19th century, surrounded the first manifestations of the idea of consecrating a “right to work”. This retrospective is followed by a political theory analysis, in which Renaat Hoop maps out the multiple justifications that are formulated nowadays in favour of or against the strengthening of the duty to work for the unemployed.

The second part contributes to documenting the diversity of the interplay between the right and the duty to work that underpins contemporary activation policies, by means of a double case study. Diane Roman reports on the legal and political developments observed in France, while Daniel Dumont focuses on another iconic country: the United States.

The third part looks at the fundamental right to work, in order to identify the specific criteria by which to assess the conformity of national measures promoting the return to employment, first with respect to the international instruments protecting said right, and then with respect to the philosophy that underlies this right. In her two contributions, Elise Dermine dissects the case law – largely unknown – of the bodies supervising the application of the international conventions that, as regards civil and political rights, prohibit forced labour and that, as regards economic, social and cultural rights, enshrine the right to freely chosen work. In doing so, she identifies the legal limits resulting from each type of convention that can be opposed to the exacerbation of the duty to work of beneficiaries. In a complementary way, Jean-Michel Bonvin and Eric Moachon mobilise the work of the Nobel Prize winner for economics Amartya Sen as well as comparing social protection systems, in order to identify ways that are likely to improve the effectiveness of the right to work of the unemployed, on both its positive and negative sides.

Finally, by way of contribution to the debate of ideas, the fourth and final part, which is more prospective, is devoted to the critical presentation of two proposals at odds with the coercive variant of activation. Yannick Vanderborgh defends the idea of guaranteeing to every individual, in a completely unconditional manner, a universal basic income, while, in his contribution, Philip Harvey delivers a plea to secure the guarantee of a decent job for every jobseeker.

The book ends with the concluding reflections of Olivier De Schutter, in which he proposes to redefine the human rights approach to activation policies and formulates several proposals in this perspective.

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In a recent inventory of empirical research in social security law, Michael Adler regretted that the legal features of activation policies and their impact on the node of rights and duties remain relatively unexplored.¹³ The editors of this volume hope that it will help to fill this gap and encourage new research in this direction.

¹³ M. Adler, “Social Security and Social Welfare”, in P. Cane and H. Kritzer (eds.), *Oxford Handbook of Empirical Legal Research*, Oxford, Oxford University Press, 2010, p. 421.