

The “Social” in Social Law –An Analysis of a Concept in Disguise

Mauro Zamboni¹

1	What is the Issue at Stake?	516
2	<i>Functions as Effects and Functions as Purposes:</i> From “Social” Law to “Socializing” Law	522
3	Social Law as the Welfare State’s Law	529
4	Conclusion	538

¹ Associate Professor at the Faculty of Law, Stockholm University (Sweden) and Research Associate at *The Collaborative Research Centre 597 “Transformations of the State,”* University of Bremen (Germany). I would like to deeply thank Laura Carlson for her many helpful comments on earlier drafts. I also thank Fredric Korling, Jane Reichel, Jori Munukka, Herbert Jacobsson, Åke Frändberg, Minna Gräns, and the participants in the Higher Seminar in Jurisprudence at the Department of Law, Uppsala University, for their invaluable comments to this article.

"The civilization that brought you world war, the assembly line, social security, income tax, deodorant, and the toaster oven is dying. Deodorant and toaster ovens may survive. The others won't."

James Dale Davidson and Lord William Rees-Mogg, *The Sovereign Individual* 32 (1998).

The law and legal disciplines are not created in a *vacuum*. Though they appear "natural" and almost self-evident, the law and legal disciplines always tend, to a greater or narrower extent, to mirror the reality in which they are born and in which they grow. As pointed out some years ago by Jeremy Waldron:

Legislatures and courts are *political* institutions; the rule of law is a *political* ideal; adjudication and legal reasoning are practices and techniques which are part of the *political* culture of the societies in which they flourish.²

The Welfare State and its ideological underpinnings in particular, with its ever growing tendency to monopolize the legal discourse for purposes of "social engineering", has led to the construction of many new branches of law and legal disciplines, functional to the implementation of the basic values behind this form of political organization.³

Social law (also known as *social security law*, *social protection law* or *social welfare law*, hereinafter simply referred to as *social law*) can be considered, both as system of normative regulation and as a legal discipline, one of the most typical examples of law born and bred inside and because of the Welfare State's form of political organization.⁴ As pointed out by Friedman, the focus of the Welfare State with respect to social law is due to the fact that this political form of organization mainly aims to satisfy "the quest for security, for a safe harbor, a cocoon, the insurancy society, risklessness, and social guarantees; comfort

2 Jeremy Waldron, *Legal and Political Philosophy*, in J. Coleman and S. Shapiro, *The Oxford Handbook of Jurisprudence & Philosophy of Law* 352 (Oxford: Oxford University Press, 2002) [italics in the text]. See also Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* 42 (Oxford: Clarendon Press, 1995) for the premise that the disciplines are not only intellectual phenomena but also social constructs. See, e.g., Geraint Howells and Stephen Weatherill, *Consumer Protection Law* 5 (Aldershot: Ashgate Publishing, 2nd ed., 2005).

3 See Manfred Rehbinder, *Status, Contract, and The Welfare State*, *Stanford Law Review* 23: 947 (1971); and Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* 67-68 (Cambridge: Harvard University Press, 1994). See, e.g., the effect of the Welfare State ideology of granting "security" to the weaker parts of a society on the traditional regulation of contracts (in particular with the increasing number of statutory terms) in Wolfgang Friedmann, *Law in a Changing Society* 129-138 (Berkeley: University of California Press, 2nd ed., 1972); or Neil Duxbury, *Patterns of American Jurisprudence* 149-150 (Oxford: Clarendon Press, 1995) as to the process of "statutorification" during the New Deal era.

4 See François Ewald, *A Concept of Social Law*, in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* 40 (Berlin: de Gruyter, 1986), where social law is identified as "the term for the legal practices that typify the Welfare State."

instead of chance," while the latter is the center of attention, for example, of the classic liberal State and its focal point on contract law.⁵

This article investigates to what extent the political environment in which this branch of law (and the corresponding legal discipline) originated has affected its nature. In particular, this investigation evaluates that which underlies the labeling of this specific area of law as "social." The objective is to give a non-critical account of the ideological background behind this labeling; an ideological background that affects the very way the law is approached and, somehow, molded.⁶ This naturally is not the first attempt to reveal the ideological background of social law; among the many, the endeavors in particular of Friedrich A. von Hayek and François Ewald should be mentioned.⁷ The purpose of this article is simply to somehow revitalize the debate, in particular by introducing certain fairly recent conceptual findings of the sociology of law as to the concept of the "function of the law."⁸

Part One identifies the issue at stake, namely why social law is so different from other branches of law and legal disciplines. In particular, how the more traditional legal fields and legal disciplines are labeled according to the targeted-area they aim to regulate and investigate is examined. In contrast, social law cannot be considered as having as its main target the "social" aspects of a community, these being the target of the law in general and, consequently, of all

5 Friedman, *The Republic of Choice*, *supra* at 74. It has to be pointed out that the term "social law" is often used in the socio-legal discourse in order to identify the normative regulations produced by the social system as broader than (and often alternative to) the ones produced by the positive law-making system, i.e. social law as including (and often diminishing the importance of) the positive law. See, e.g., Georges Gurvitch, *The Problem of Social Law*, *Ethics* 52: 24 (1941). In this work, however, "social law" is used as a part of the positive law or, in Gurvitch's terminology, as the parts of social law only as long as they "have been annexed by the State." *Id.* at 36.

6 See William Lucy, *What is Wrong with Ideology?*, *Oxford Journal of Legal Studies* 20: 288-289 (2000) as to the definition of a non-critical account of ideologies in legal doctrinal investigation as used in this work. See also Niklas Luhmann, *Law as a Social System* 342-343 (Oxford: Oxford University Press, 1994).

7 See, e.g., Hayek, *Law, Legislation and Liberty*, vol. 2: *The Mirage of Social Justice* Ch. 3 (Chicago: University of Chicago Press, 1976); and Ewald, *A Concept of Social Law*, *supra* at 40-42. See also Paul Orianne, *La notion du droit social* 127 (Nivelles: CBDS, 1962); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal* 37-39, 42-43 (Cambridge: Cambridge University Press, 2006); André Lagasse, *Sécurité sociale et droit du travail*, *Annales de Droit et de Sciences politiques* 1951: 224-234 (1951); and Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, *Iowa Law Review* 73: 51-52 (1987).

8 As to a similar attempt, though focused on public law and by using political science's conceptual tools, see Martin Shapiro, *From Public Law to Public Policy, or the "Public" in "Public Law"*, *Political Science* 5: 412-413 (1972). See also Martin Loughlin, *The Idea of Public Law* 1 (Oxford: Oxford University Press, 2003), using the basic question of "what it does" as the basic methodology to define public law. But see Gurvitch, *The Problem of Social Law*, *supra* at 21, where the author aims at investigating the "sociological aspect of the problem of social law" by directly using sociology to explain the term "social," while here the attempt is more in the direction of using a sociological terminological apparatus in order to clarify certain legal terminologies.

legal disciplines. Part Two then proceeds to bring to the surface the true meaning behind the term “social” in social law. By making use of a sociological analytical tool, namely the distinction between *functions-as-effects* of law and *functions-as-purposes* of law, it can be seen how social law tends to mirror and explicate in a more direct way that which is its ideological underpinning: the purpose of socializing certain areas of human life, areas usually regulated by non-legal normative systems. The final Part Three connects this specific feature of social law with the environment in which this branch of law was born and finds its life-blood, namely the Welfare State.⁹

1 What is the Issue at Stake?

Looking at the legal field of social law from a theoretical perspective, the most important question is in its very definition, namely “social” law.¹⁰ The label of a legal field usually identifies (at least evidently) the part of the legal system that the field takes care of, or in the case of the legal discipline, is under investigation. For example, tax law is that body of laws governing taxation, i.e. monies for the financial support of public authorities; or banking law is that area of law dealing with the organization and regulation of banks.¹¹

In the case of social law, it actually is very difficult to find a clear definition of what social law concerns. As pointed out by Yves Stevens, “social law” is a polysemic and evolutionary concept: it means different (though not concurrent) things in different national systems and its content tends to evolve according to

9 In this work, “Welfare State” is used as a unified concept for what actually are different forms of political, social, and economic organizations. As to a factual variegated typology of “Welfare States,” see, e.g., Mary Ruggie, *The State and Working Women: A Comparative Study of Britain and Sweden* 15 (Princeton: Princeton University Press, 1984). Moreover, Welfare State is used in this work as inclusive also of the concept of “regulatory state.” As to the difference between the two, see, e.g., Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, Australian National University, National Europe Centre 100: 4 (2003) [available at “www.anu.edu.au/NEC/scott1.pdf”]; last visited October 26, 2007].

10 See Hayek, *Law, Legislation and Liberty, Vol. 1: Rules and Order* 141-142 (Chicago: University of Chicago Press, 1973), pointing out some possible meanings of the concept “social” in “social legislation;” and Kennedy, *Two Globalizations of Law and Legal Thought: 1850-1968*, *Suffolk University Law Review* XXXVI: 649-650 (2003).

11 See, e.g., Chris Whitehouse, *Revenue Law: Principles and Practice* 5-6 (London: Butterworths, 18th ed., 2000); the often quoted judicial definition in *Beard v. City of Atlanta*, 86 S.E.2d 672, 676 (Ga. 1955); or Bryan A. Garner (ed.), *Black's Law Dictionary* 1502 (St. Paul: West Publishing, 8th ed., 1979); or Ross Cranston, *Principles of Banking Law* 4 (Oxford: Oxford University Press, 2nd ed., 2002). *But see*, for instance, Martin Daunton, *What is Income?*, in J. Tiley (ed.), *Studies in the History of Tax Law* 3-14 (Oxford: Hart Publishing, 2004) or Frederik Zimmer, *The Development of the Concept of Income in Nordic Income Tax Law*, *Scandinavian Studies in Law* 44: 394-397 (2003) as to the difficulty, for instance, to analytically define what “income taxation” is about; or Cranston, *Principles of Banking Law*, *supra* at 5-8 as to the unclear legal definition of “bank” and “banking.”

the changing social and economic environments.¹² The several treatises in the field are certainly neither helpful since the common definition often given in the first pages is that social law deals with a fairly heterogeneous and fragmented complex of various areas: from welfare issues to family matters, from pension rights to consumer protection.¹³

Some authors have attempted to narrow the extension of the concept of social law down to that legal area dealing with all the problems raised by employment and the lack of it or by the implementation of social rights as the target of social law.¹⁴ Others have defined social law as that part of law that in contrast to "economic law", such as contract law, generally regulates the distribution of state financial aid.¹⁵ The definitions provided in these cases also seem quite vague and in the end, pretty useless if one wants to identify the core of the work of social lawyers, social law-makers and social legal scholars. For example, the regulation of the distribution of state financial aid also fits as a definition for a typical "economic law" such as taxation law. This is true in particular in all cases when the latter is used as an incentive to certain productive activities because it is thought that these will help better spread welfare in a society. For example, state financial aid can be distributed in the form of taxation benefits to rural areas or for biodiversity in agriculture in order to promote the welfare of a population by not creating a "rich cities vs. poor rural areas" situation or by generating a better interaction with the surrounding environments.¹⁶

12 See Stevens, *The meaning of "national social and labour legislation" in directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision* 29-31 (Leuven: Katholieke Universiteit Leuven Institute of Social Law, 2004). See also Hans Zacher, *Juridification in the Field of Social Law*, in G. Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* 374-376 (Berlin: de Gruyter, 1987).

13 See, e.g., Jo Shaw, Introduction, in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* 3 (Oxford: Hart Publishing, 2000), speaking of a "rather loosely bundled groups of topics." See also Ferdinand von Prondzynski and Ada Kewley, *Social Law in the European Union: The Search for A Philosophy*, *Columbia Journal of European Law* 2: 266 (1966).

14 See, e.g., Ulrich K. Preuss, *The Concept of Rights and the Welfare State*, in G. Teubner, *Dilemmas of Law in the Welfare State*, *supra* at 162-163 (as social law as aiming in implementing in the legal world the social rights or, as in Preuss' definition, "distributive rights"); Gerard Lyon-Caen, *Manuel de droit social* 7 (Paris: Librairie générale de droit et de jurisprudence, 1987) (social law as aiming at regulating all employment and unemployment situations in which individuals can find themselves); and Philip M. Larkin, *The 'Criminalization' of Social Security Law: Towards a Punitive Welfare State?*, *Journal of Law and Society* 34: 295 (2007) (social law as aiming at improving social security, economic equality in society and the chances for the disadvantaged to reenter the labor market).

15 See, e.g., Tamara K. Hervey, *European Social Law and Policy* ix (London: Longman, 1998) and Eva Ryrstedt, *Family Law And Social Law: Reciprocal Dependency in A Comparative Perspective*, *International Journal of Law and Policy and Family* 20: 44 (2006) (social law as aiming at the distribution of public financial support).

16 See, e.g., Jacqueline Lesley Brown, *Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform*, *Journal of Environmental Law and Litigation* 12: 247-255

In contrast to the definition of “social law,” when invoking expressions such as *contract law*, *constitutional law* or *criminal law*, both as legal fields and legal disciplines, the terms “contract,” “constitutional” or “criminal” traditionally indicate the area of the legal system that this part of the law regulates. For example, contract law aims at regulating the complex of relationships directed at exchanging, selling, renting or creating services and/or goods by means of a written or oral agreement or “implied behavior” that goes under the heading of *contract*.¹⁷ Constitutional law deals with all matters that somehow are related to the basic rights and distribution of power included in the highest level of legal documents or legal practices that go under the name of *constitution*.¹⁸ Similarly, criminal law has as its primary target all prohibitions of certain conduct defined by law as *criminal* and therefore punishable by a specific type of sanction.¹⁹

For most legal fields, the terms characterizing and distinguishing them identify the web of legal relations and/or legal status that the very law is to regulate.²⁰ As pointed out by many legal theoreticians (from Hans Kelsen to Gunther Teubner), it actually is often the very legal field that somehow creates its object of regulation and, for legal disciplines, of investigation.²¹ Without criminal law statutes defining certain conduct as “criminal”, the very object of criminal law would disappear. Without contract law statutes or judicial decisions “recognizing” certain actions or writings as contract, contract law would be an empty term. In short, legal fields get their specific features by molding

(1997) (as to tax incentives for biodiversity); or the President’s National Advisory Commission on Rural Poverty, *The People Left Behind* 115 (Washington: U.S. Government Printing Office, 1967) (as to tax incentives for poor rural areas).

17 See, e.g., Hugh Collins, *The Law of Contract* 1-3 (London: Butterworths, 4th ed., 2003); or Roy M. Goode, *Commercial Law* 8 (London: Penguin Books Ltd, 3rd ed., 2004), as to a classical definition of commercial law as the “branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade.”

18 See, e.g., Owen Hood Phillips et al., *Constitutional and Administrative Law* 3 (London: Sweet and Maxwell, 8th ed., 2001). As to the modern understanding of the concept of “constitution,” see Raoul C. van Caenegem, *A Historical Introduction to Western Constitutional Law* 150-151 (Cambridge: Cambridge University Press, 1995).

19 See, e.g., Andrew Ashworth, *Principles of Criminal Law* 1-2 (Oxford: Oxford University Press, 5th ed., 2006).

20 See Luhmann, *Law as a Social System*, *supra* at 36. See also Dennis J. Galligan, *Law in Modern Society* 122 (Oxford: Oxford University Press, 2007): “One of the ways of not taking law seriously is to neglect the differences among sets of laws and the purposes for which they are used.”

21 See, e.g., Kelsen, *Pure Theory of Law* 2-4 (Berkeley: University of California Press, 1970); Kelsen, *General Theory of Law and State* 434 (New York: Russell and Russell, 1961); Neil D. MacCormick, *Rights in Legislation*, in P. M. S. Hacker and J. Raz, *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* 189-191 (Oxford: Oxford University Press, 1977); Luhmann, *The Self-Reproduction of Law and its Limits*, in G. Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, *Law and Society Review* 18: 295 (1984). See also Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* 48 (New York: Pantheon books, 1972), pointing out how discursive practices characterizing each discipline in general produce their own objects of discussion.

themselves around a phenomenon constructed and existing as long as the law recognizes it.²²

As pointed out by Geoffrey Samuel, for example, the distinction between private law and public law (and the parallel separation of legal disciplines into two major groups) does not mirror an empirical separation between relations among individuals and relations of state agencies with individuals.²³ In both cases, Samuel continues, it is always individuals relating their rights to the rights of other individuals.²⁴ The distinction of a field of law (and studies of law) known as private law and one known as public law is simply an ideological dogma which became a reality, *in primis* for legal actors, since it somehow is "created" by the very law and, often, by legal scholarship.²⁵ One classical example is the very idea of state agencies as "legal *personas*" with their own lives, distinct from the individuals actually taking the decisions affecting the lives or economies of other individuals.²⁶

When the focus is moved to social law, one immediately notices that a definition of the legal field based on its object of regulation or creation becomes more difficult.²⁷ Legal scholarship refers to social law as a quite heterogeneous and disparate group of legal categories and legal areas, lacking a common basic legal category (as contract in contract law) or group of documents (as in constitutional law) or target (as in criminal law). Social law scholars deal with

22 See MacCormick, *Legal Reasoning and Legal Theory* 246 (Oxford: Clarendon Press 1978), talking of a "circular relation" as characterizing the legal discipline and its internal doctrinal and practical components. See, e.g., Andrew Halpin, *Definition in the Criminal Law* 187-196 (Oxford: Hart Publishing, 2004); or Collins, *The Law of Contract*, *supra* at 51-54, as to reducing the legal status of documents from contracts to simply piece of papers in case of "illegality or conduct which is contrary to public policy" (*id.* at 51); or Christopher M. V. Clarkson and Heather M. Keating, *Criminal Law: Text and Materials* 3-25 (London: Sweet and Maxwell, 5th ed., 2003) as to the complex of problems arising when defining certain conduct as "criminal" (e.g. sado-masochism between consenting adults as criminal or only morally reprehensible behavior).

23 See Samuel, *Public and Private Law: A Private Lawyer's Response*, *Modern Law Review* 46: 563 (1983). *But see* Pound, *Public Law and Private Law*, *Cornell Law Quarterly* XXIV: 471-482 (1939). See also Gurvitch, *The Problem of Social Law*, *supra* at 19-20, where the author points out the connection between the problem as to the definition of a law as "social" and the traditional dichotomy public law vs. private law.

24 See Samuel, *Public and Private Law: A Private Lawyer's Response*, *supra* at 562-563. See also Kennedy, *The Stages of the Decline of the Public/Private Distinction*, *University of Pennsylvania Law Review* 130: 1351-1352 (1982) as to the problems in modern legal systems of keeping this dichotomy of private vs. public law.

25 See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, *Harvard Law Review* 96: 1518-1520 (1983); and, as to the United Kingdom's legal system, Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, *Oxford Journal of Legal Studies* 25: 212-214 (2005).

26 See, e.g., Allan C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* 88-94 (Toronto: Carswell of Canada Ltd., 1988). See also Gilles Deleuze and Félix Guattari, *What is Philosophy?* 72 (New York: Columbia University Press, 1994).

27 See, e.g., Ewald, *A Concept of Social Law*, *supra* at 63-64 where social law is defined not according to its object of regulation, but according to its specific type of rationality (i.e. aimed at settling conflicts and balancing interests in a society).

family or welfare matters, but also with pension rights or damages in criminal cases.²⁸

This "amorphous" character of the target of social law, both as a normative field and as a legal discipline, has its roots in the very ontology of the phenomenon under investigation. As seen previously, it usually is the law itself that creates or somehow "translates" the object of observation into the legal discourse for the different legal fields. In this case, however, law and the legal discourse in general neither define nor directly construct the area social law places under scrutiny. While for cyber space consumer law, for instance, the very idea of the electronic marketplace is defined by the legal system (or better transported from the economic and technological discourses and recognized inside the legal one), there is neither a definition nor even less a recognition of what "social" (or "society") is or means inside the legal discourse.²⁹

When it comes to social law, certain questions immediately surface: What is the target of the legal area known as "social law"? If contract law deals with or investigates the legal aspects of "contract," does social law then deal with the legal aspects of "society"? Is not this the very function of law in general, regardless of its goals, to deal, in a regulative, repressive, or performative way, with society as a whole?

The basic issue is that in contrast to other legal fields and disciplines, the term "social" in social law does not seem to give any clear indication of the area on which this branch of law operates. If one proposes a solution to this uncertainty by claiming that social law is that part of law regulating and molding social relations within a certain community, this solution seems to suffer from a misconception of what is meant by social relations.³⁰

The classical definition of social relations developed inside sociology is that it is "the behavior of a plurality of actors insofar as, in its meaningful content, the action of each takes into account of that of the others and is oriented in these

28 See Zacher, *Juridification in the Field of Social Law*, *supra* at 376. See, e.g., Ewald, *A Concept of Social Law*, *supra* at 41, where the author includes in social law, besides traditional labor and social security law, also aspects of tort law, consumer law, environmental law and even the international development law.

29 See Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* 210, 232 (Oxford: Oxford University Press, 2nd ed., 2003), pointing out the general negligence in the attention of traditional legal thinking towards the idea of "social" and, instead, its central position in more recent legal theoretical developments (e.g. feminist jurisprudences and Critical Race Theory). Cf. Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices* 2-4 (Aldershot: Ashgate Publishing, 2005). But see Ewald, *A Concept of Social Law*, *supra* at 70, where the author identifies the target of social law in all the legal norms of a legal system allowing the society to continually adjust itself to the social, political and economic modifications.

30 See, e.g., Yves Saint-Jours, France, in D. Zöllner et al. (eds.), *Un siècle de sécurité sociale 1881-1981: L'évolution en Allemagne, France, Grande-Bretagne, Autriche et Suisse* 145-168 (Nantes: CRHES, 1982); or Larkin, *The 'Criminalization' of Social Security Law*, *supra* at 301-303, where the basic goal of US and UK social law is traced back to the desire of social behavior modification. See also European Commission, *The Social Dimension of the Internal Market* 15 (Brussels: European Trade Union Institute, 1988) where social law is considered as being the complex of legal tools aimed at improving conditions in "the social sphere."

terms.”³¹ This being a well-established definition of social relations, it appears obvious that all branches of law have as their basic goal the one of regulating the behavior of actors. Criminal law is built, for instance, for the very purpose of making members of a community well aware of the fact that if they engage in certain behaviors, they will most likely be sent into prison. Similarly, contract law also generally aims somehow at guaranteeing to the party to a contract that all other parties to the contract will perform as agreed.³²

As a matter of fact, the primary goal of the law in general is often identified with this regulative and/or constitutive function of social relations. As pointed out by Weber, and more recently by Luhmann, the very goal of legal systems is to somehow “stabilize” the element of uncertainty typical of non-legally regulated relations among actors.³³ The legal system instead offers various actors a certainty (or at least a high degree of probability) that, due to the enforcement guaranteed by specialized enforcement agencies employing coercive measures, other actors will tend to react (or not) in certain predictable ways.³⁴ As strikingly pointed out by Gurvitch already in the 1940’s:

For is not every law social in this double sense that it always regulates social matters and that it finds in society the foundation for its binding validity? Did not the Roman jurists long ago say: “Ubi societas, ibi jus”?³⁵

The label “social” in social law as a result cannot indicate the area of social relations that this branch of law is to regulate since law in general has as its

31 Max Weber, *Economy and Society: An Outline of Interpretative Sociology* 26 (Berkeley: University of California Press, 1978).

32 See, e.g., Emile Durkheim, *The Division of Labor in Society* 25 (New York: The Free Press, [1893] 1984). See also Hart, *The Concept of Law*, *supra* at 135: “The life of the law consists to a very large extent in the guidance of officials and private individuals by determinate rules which... do *not* require from them a fresh judgment from case to case” [italics in the text]. But see Peter Goodrich, *Legal Hermeneutics; An Essay on Precedent and Interpretation*, *Liverpool Law Review* VII: 124-139 (1985). See, e.g., David I. Campbell and Philip A. Thomas, *Socio-legal Analysis of the Law of Contract*, in P. A. Thomas (ed.), *Socio-Legal Studies* 239-242 (Aldershot: Dartmouth, 1997); or for criminal law and for contract law; and John Kaplan et al., *Criminal Law: Cases and Materials* 23 (New York: Aspen Publishers, 5th ed., 2004).

33 See Weber, *Economy and Society*, *supra* at 34; and Luhmann, *Law as a Social System*, *supra* at 148, 152-153. As to the constitutive function of the law, see Galligan, *Law in Modern Society*, *supra* at 331-333; William M. Evan, *Law as an Instrument of Social Change*, in W. M. Evan (ed.), *The Sociology of Law* 555 (New York: The Free Press, 1980); and Douglas Litowitz, *The Social Construction of Law: Explanations and Implications*, *Studies in Law, Politics, and Society* 21: 218-220 (2001).

34 See Weber, *Economy and Society*, *supra* at 217-226, 314; and Joseph Raz, *The Concept of A Legal System: An Introduction to the Theory of Legal System* 113 (Oxford: Clarendon Press, 2nd ed., 1980). See also Talcott Parsons, *The Law and Social Control*, in W. M. Evan (ed.), *Law and Sociology* 58-59, 61-62 (New York: The Free Press, 1962); Gianfranco Poggi, *The State: Its Nature, Development and Prospects* 4 (Stanford: Stanford University Press, 1991); and Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* 228 (Berkeley: University of California Press, 1989).

35 Gurvitch, *The Problem of Social Law*, *supra* at 18.

object the regulation of social relations. If this is the case, then the reason for why a certain branch of law is called "social" has to be sought elsewhere, in a place other than the kind of relations the very branch of law regulates.

2 *Functions as Effects and Functions as Purposes: From "Social" Law to "Socializing" Law*

The name of a legal field or legal discipline also normally indicates, besides the area of intervention of the normative regulations, the functions to which the legal rules belonging to this field are assigned. For example, contract law indicates all the groups of rules with the primary function of regulating the area of contract; constitutional law characterizes all the rules, principles or maxims having the primary function of "affixing" the highest governmental institutional relations and certain basic rights and duties of citizens.³⁶

When the attention is moved to social law, one can see that the vast majority of scholars and practitioners tend to define its function in relation to that previously defined as "economic law" (or in some cases, "management law").³⁷ A classical case in this direction is the vast literature on the European Union's legislation as operating simultaneously in two (often diverging) directions, namely towards economic liberalization through economic law and towards the promotion of a European social dimension through social law.³⁸ The function of social law is then identified in guaranteeing and promoting social security and social justice among EU citizens, *e.g.* through job security or unemployment benefits, against the outcomes of an economy "liberalized," for instance, by legal measures promoting investments in certain areas by lowering minimum-wages.³⁹ In short, social law is often defined as that part of the law having the function of making every individual feel "secure."⁴⁰

36 See Charles L. Knapp et al., *Problems in Contract Law: Cases and Materials* 15-16 (New York: Aspen Publishers, 5th ed., 2003); and Geoffrey R. Stone, *Constitutional Law (Casebook)* 1-8 (New York: Aspen Publishers, 5th ed., 2005). *But see* Gavin Anderson, *Constitutional Rights after Globalization* 107-114 (Oxford: Hart Publishing, 2005), as to the political roots in the way of defining constitutional law.

37 See, *e.g.*, Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* 274-280 (Cambridge: Cambridge University Press, 2006), where the author defines social law as "infralaw," an alternative (though nowadays subordinate) to "economic law."

38 See, *e.g.*, Shaw et al., *The Economic and Social Law of the European Union* 343-366 (London: Palgrave Macmillan, 2007); or Pierre Pestieau, *The Welfare State in the European Union: Economic and Social Perspectives* 1-2, 50-66 (Oxford: Oxford University Press, 2006).

39 See, *e.g.*, Prondzynski and Ada Kewley, *Social Law in the European Union*, *supra* at 267-268, 270-274.

40 See, *e.g.*, Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, *Yale Journal of Law and the Humanities* 18: 135 (2006); or Ravi Naidoo and Isobel Frye, *The Role of Workers'*

However, this definition of social law as that part of law working to promote social security seems pretty vague and does not capture the essence characterizing social law as different from other legal areas. Is not the function of law in general, and therefore also of areas such as criminal and constitutional law, the one of making the members of a community feel "secure" against certain behaviors of individuals or certain abuses by public authorities?⁴¹ What then is the function behind "social" law? Does it aim at regulating or fixing "social" relations?

As society and its constitutive social relations are the targets of the function of law in general, though with different purposes (*e.g.* repressive, regulative, legitimizing), the first step is to find out what specific function is assigned by the label "social" in social law. In particular, this first move consists of looking to an analytical distinction as to the meaning of "functions of law" as developed in a discipline "naturally" close to the issue of law and society, namely sociology and, more specific, the sociology of law.

In recent decades, a quite intense debate has evolved within the sociology of law around the concept of *functions* of law. To roughly summarize it, the concepts invoked in the debate, functions of law (and, in our case, functions of social law) can mean the different features of the law. A distinction has been drawn between functions of law as the *effects* or actual consequences of the law (or a specific branch of law) on a community ("what law does"), and the functions of law as the *purposes* or goals the law is intended to have in a community ("what law is thought to do").⁴² For example, the function-effect of labor law can be the maintenance of existing economic forces in the labor market (*e.g.* employer associations and trade unions) while the function-purposes are instead the promotion and defense of all individual employee rights.⁴³ Translating these definitions in legal theoretical terms, one can say that

Organizations in the Extension of Social Security to Informal Workers, Comparative Labor Law and Policy Journal 27: 192 (2006).

41 See, *e.g.*, Ashworth, *Principles of Criminal Law*, *supra* at 37. See also Herbert H. L. A. Hart, *The Concept of Law* 193-198 (Oxford: Oxford University Press, 2nd ed., 1994) and his famous idea of a "minimum content of natural law" as a necessary condition in order to speak of a "legal" system and aimed at making individuals feel secure (*e.g.* in their possession or in their agreements with other individuals or in their physical integrity).

42 See Cotterrell, *The Sociology of Law: An Introduction* 72-73 (London: Butterworths, 2nd ed., 1992). See also a similar distinction pointed out as to the common law by Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 191, 246-249 (Cambridge: Cambridge University Press, 2006), though Tamanaha speaks of a distinction between a "non-instrumental attention" to consequences and an "instrumental attention" to consequences, the latter characterizing modern law-making, law applying, and legal scholarship. As to an example of terminological confusion between "functions as purposes" and "functions as effects," see, *e.g.*, Vilhelm Aubert, *The Rule of Law and the Promotional Function of Law*, in G. Teubner, *Dilemmas of Law in the Welfare State*, *supra* at 30-31; or, more recently, Henry Hansmann and Ugo Mattei, *The Functions of Trust Law: A Comparative Legal And Economic Analysis*, New York University Law Review 73: 472-478 (1998).

43 This "gap" (at least from the labor union perspective) between purposes and effects in labor law has been particularly pointed out by critical legal theory; see, *e.g.*, Klare, *Critical Theory*

when speaking of the "functions of law," it is possible to distinguish two different ideal-types of function. "Function-as-effects" of law indicates the outputs of the law, namely the way a certain rule(s) has an effect on the legal system as a whole, or on a part. "Function-as-purposes" instead addresses the values (or model of behaviors) the law aims to introduce into a certain community.⁴⁴

This distinction is actually extremely helpful when trying to understand that underlying the different labeling of the different branches or areas of law, *e.g.* "contract" law, "constitutional" law or, not the least, "social" law. If one looks at the most traditional legal disciplines, such as criminal law, contract law or constitutional law, it is usually apparent that the different labels "contract" or "constitutional" or "criminal" generally indicate the different targets of the function-effects (or outputs in legal theoretical terms) of these different laws. For example, *contract* law includes all the rules, maxims and legal discipline that somehow has some kind of effect on the legal institution known as "contract;" *constitutional* law deals with all the rules and principles having an impact on the document known as a "constitution;" *criminal* law focuses on all legal norms affecting or surrounding the model of behaviors prohibited by law for being "criminal."⁴⁵

Obviously, this is only a tendency towards an ideal-typical labeling of different laws according to the areas in which the very laws have an impact. First, this "tendency" feature means that criminal law provisions can (and usually do) have effects also outside the area of criminal behavior, *e.g.* in contract law (particularly in the protection of consumers), or a constitutional provision dealing purely with the relations among public authorities in a certain legal system (*e.g.* competence of constitutional courts and European Court of Human Rights) actually influences the law-making or law-applying in other fields, *e.g.* in criminal procedural law.⁴⁶

Second, though the label of a certain law indicates where its outputs are directed, one can easily note how each of the labeling of the different "laws" carries with it a specific value-choice, *i.e.* how the naming of "contract" law, "criminal" law or "constitutional" law is not done to indicate the targeted-area,

and Labor Relations Law, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* 64-69, 80-81 (New York: Pantheon Books, 2nd ed., 1990).

44 *See, e.g.*, Friedmann, *Changing Functions of Contract in The Common Law*, University of Toronto Law Journal 9: 19-22 (1951), speaking of gap between theory in contract law ("function as purpose") and the real impact of contract law ("function as effects"). Though not speaking explicitly of function-as-effects and functions-as-purposes, *see* Jürgen Habermas, *Between Facts And Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: The MIT Press, 1998) 255, 282. *See also* John A. Simmons, *Moral Principles and Political Obligations* 16-23 (Princeton: Princeton University Press, 1979).

45 *See, e.g.*, Hugh Collins, *The Law of Contract*, *supra* at 9; Owen Hood Phillips et al., *Constitutional and Administrative Law*, *supra* at 5-7; and Clarkson and Keating, *Criminal Law*, *supra* at 1-2.

46 *See, e.g.*, Chris Turner, *Unlocking Contract Law* 8-9 (London: Hodder Education, 2nd ed., 2007); or Matthias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights*, German Law Journal 6: 876-877, 887-890 (2005).

but with the very purpose of implementing a certain ideology in the community. As noted by critical legal theories and postmodernists, there is no such thing as a "neutral" legal discipline, and even less, a "neutral" terminology.⁴⁷ As pointed out by Foucault, language in modern society is power, and "naming" things is in itself an exercise of power, *i.e.* an attempt to impose on others one's own ideas or models of behaviors.⁴⁸ For example, both Karl E. Klare and Frances E. Olsen have shown how, by dividing the law in general into two large groups, such as public law and private law, legal scholars, lawyers but also the community in general actually take for granted a specific ideological underpinning, *i.e.* a liberal ideology that only relations between the individual and state organs are targets of public control and regulation, while relations among individuals (*e.g.* in family matters or in economic relations) are left to the "free will" of the individuals.⁴⁹

Despite these specifications, it nevertheless can be said that, when speaking of functions of laws such as contract law, criminal law or constitutional law, lawyers, judges and legal scholars all primarily have in mind the area in which the law has (or will have) some kind of outputs, respectively the one of contract, of criminalized behavior, or of a constitution.⁵⁰

47 See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, University of Chicago Law Review 54: 463-470 (1987). See, *e.g.*, Marjet Gunning, *Women, rights and difference*, Liverpool Law Review 9: 138 (1987). But see John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, Duke Law Journal 45: 86-98 (1995).

48 See Foucault, *The Archaeology of Knowledge and the Discourse on Language*, *supra* at Ch. 2. See also Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* 7-12, 41-43 (Chicago: Pluto Press, 1994); and Anne Barron, *Foucault and Law*, in J. Penner et al. (eds.), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* 955-997 (London: Butterworths, 2002). Cf. with the same problem faced by social scientists and their construction of the concept of "social" as in Bruno Latour, *The Politics of Explanation: An Alternative*, in S. Woolgar (ed.), *Knowledge and Reflexivity* 161 (London: Sage, 1988); and Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, *Hastings Law Journal* 38: 817-818 (1987). But see *id.* at 839: "The law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law" [italics in the text].

49 See the two classic works by Klare, *The Public/Private Distinction in Labor Law*, University of Pennsylvania Law Review 130: 1415-1421 (1982), pointing out that "[t]he essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way" (*id.* at 1417); and by Olsen, *The Family and the Market*, *supra* at 1499-1513, whose main goal is to point out how, through the legal system, two dichotomies (market/family, state/civil society) have been established in Western socio-political cultures as they were "natural" distinctions and where the second term of each dichotomies (family and civil society) should "naturally" be left outside the legal regulation.

50 See, *e.g.*, Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, Northwestern University Law Review 94: 816 (2000), and his idea of "relational contracts" as those contracts "that involves not merely an exchange, but also a relationship, between the contracting parties;" or Erik Luna, *The Overcriminalization Phenomenon*, American University Law Review 54: 714 (2005), where criminal law is described as that part of the legal system directed at punishing "specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official

In contrast to this type of laws and legal disciplines, social law instead seems to have been labeled based more on the function-as-purpose feature.⁵¹ As seen above, it is not possible to characterize social law as that branch of law having the function of regulating, legitimizing or even repressing certain kinds of behaviors or relations, “social” relations being the typical target already for the function of law (and legal discipline) in general. In other words, it is not possible to locate the very function social law plays in a certain community if one considers function in the sense of outputs such a law produces or is going to produce.

Instead, the term “social” in social law is primarily indicative of the function-as-purposes behind the very construction of this law and the corresponding legal discipline. The primary focus of social law is not to “regulate” or “legitimize” something such as “society” or “social relations.” The primary and characterizing goal of social law is its function-as-purpose: social law is the part of law having as a primary function the one of “socializing” certain areas of human relations that traditionally have been considered the domain of other types of normative but non-legal discourses (*e.g.* morals in family matters or religious norms in welfare matters).⁵² By regulating these areas by law and thereby putting them on the legal agenda, the fundamental idea is that areas like family law, welfare issues and so on will be more under the control of the legal discourse, which in an ideal democracy should be the “true and only voice” (through the central role of elected politicians in the law-making) of the society, instead of discourses which tend somehow to be expressions of more non-democratic normative systems (*e.g.* a religious discourse in welfare issues or a moral discourse in family issues or an economic discourse in labor issues). As pointed out by Ewald, “[t]he issue is no longer so much being in the right, as having rights.”⁵³

In other words, as for many disciplines relatively new (*e.g.* gender approach to the law or socio-legal studies), the labeling *social* law is assigned in order not

condemnation and denial of freedom that flow from a guilty verdict;” or James A. Gardner, *What Is A State Constitution?*, Rutgers Law Journal 24: 1027 (1993), where the author states that “the function of constitutional law is precisely to serve as a forum for debating the meaning of the constitution.”

51 As a similar enterprise of defining social law based more on its purposes than on its effects, see Martin Partington, *The Juridification of Social Welfare in Britain*, in G. Teubner (ed.), *The Juridification of Social Spheres*, *supra* at 421-422.

52 See Teubner, *Juridification –Concept, Aspects, Limits, Solutions*, in G. Teubner (ed.), *The Juridification of Social Spheres*, *supra* at 14, speaking of “instrumentalization ... in social security law ... in which classical formal law is itself transformed for social purposes.” See also Habermas, *Law as Medium and Law as Institution*, in G. Teubner (ed.), *The Juridification of Social Spheres*, *supra* at 204, where the author characterizes the juridification in the Welfare State as “the *expansion* of law, i.e. the legal regulation of new, hitherto informally regulated social situations,” *e.g.* by means of “the institutionalization of class conflict though collective bargaining law and labour law” [italics in the text].

53 Ewald, *A Concept of Social Law*, *supra* at 46 [italics in the text]. See also Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 245-246 (Oxford: Oxford University Press, 1992), pointing out the connection between the extension of welfare rights and the enlargement of procedural guarantees.

so much to point out the function as effect (i.e. its outputs of regulating the "social" in the larger legal system), but more to stress the purposes the social law is aimed to implement into the legal system (i.e. its motive of "socializing" by law certain types of human relations).⁵⁴ Using the famous distinction drawn by Cass R. Sunstein, one could also state that social law, though it is characterized as a specific legal area instrumental to a specific political ideology, in the end is labeled according to its "expressive function," i.e. the one of announcing values and beliefs, more than to its "instrumental function," i.e. the one of changing a certain reality.⁵⁵ As for instance with the gender approach, social law does not indicate the target it is going to shoot inside the legal system; the "social" indicates a value-solution (or an ideology) provided to a problem or target crossing through the entire legal system.⁵⁶

As for many legal areas (and accompanying legal disciplines) of relatively recent formation, social law also tends to cross the boundaries of other already more established legal disciplines and to create a sort of thread among scattered rules, principles and legal institutions. As with environmental law, social law tends to connect under the same roof of regulation and investigation aspects belonging to administrative law, contract law, labor and employment law, business law and family law.⁵⁷

54 For example, the efforts of the gender approach and Critical Race Theory are in the multiple directions of changing a general situation where "law reflects the perspective of and the values of white males, and the resulting effects on citizens and on members of the legal profession who are not white males." Brian Bix, *Jurisprudence: Theory and Context* 221 (London: Sweet and Maxwell, 3rd ed., 2003). See, e.g., Janet Rifkin, *Toward a Theory of Law and Patriarchy*, *Harvard Women's Law Journal* 3: 83-88 (1980); and Harlon L. Dalton, *The Clouded Prism: Minority Critique of the Critical Legal Studies Movement*, in K. Crenshaw et al. (eds.), *Critical Race Theory: The Key Writings That Formed the Movement* 82 (New York: New Press, 1995). See also Ewald, *A Concept of Social Law*, *supra* at 46-47, according to whom the very idea of social law is to legally balance the power relations between workers and employers.

55 See Sunstein, *On the Expressive Function of Law*, *University of Pennsylvania Law Review* 144: 2022-2024 (1996). See, e.g., Bernard E. Harcourt, *After the 'Social Meaning Turn': Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, *Law and Society Review* 34: 189 (2000). It should be pointed out that all the parts of a legal system tend to have both these expressive and instrumental functions. For example, as pointed out by Sunstein, Supreme Courts not only decide in order to set the legal frameworks for legal and political actors. They also "proclaim" the values considered fundamental of a certain legal and social system. See Sunstein, *Foreword: Leaving Things Undecided*, *Harvard Law Review* 110: 69-71 (1996). The point of this work is simply to stress the fact that, differently from many other legal areas, the "expressive function" (or function-as-purpose) has been so fundamental for the construction of the legal discipline known as "social law" that the promotion of values has become the very trade-name of this legal area.

56 See Ewald, *A Concept of Social Law*, *supra* at 41, according to whom "socialization" is the transfer of the regulation of interpersonal relations from a state-centered to a society-centered legal system.

57 See Partington, *The Juridification of Social Welfare in Britain*, *supra* at 421-422. See also Habermas, *Between Facts and Norms*, *supra* at 403-404; and Richard O. Brooks, *A New Agenda for Modern Environmental Law*, *Journal of Environmental Law and Litigation* 6: 2-9 (1991), where the author points out for the current environmental law the same (negative)

However, in contrast to the other legal disciplines of more recent formation, the crossing of the boundaries for social law has little to do with the very spatial-time dimension of the phenomenon whose regulation is pursued by social law. For example, environmental law is somehow forced to take into consideration aspects of international law due to the fact that pollution tends to cross national borders, and law-makers or judges must address this border-crossing aspect in their work. For environmental lawyers and legal scholars, the primary function of what they do is to work on all the parts of a legal system that somehow have an effect on the environment.⁵⁸

When dealing with social law, one can notice how the crossing of the borders of other laws has nothing to do with the effects or outputs social law produces into the legal system. Instead, the inter-border feature is given to social law more by its functions-as-purposes. The driving engine of social law is not so much its function of constructing through its norms and doctrinal works a common legal pattern for all the parts of a legal system that somehow affect the "social" or society. This would be an impossible task, having the legal system as a whole (directly or indirectly) the function of regulating, repressing or legitimizing the social relations.⁵⁹ That central for social law instead is the specific function-purposes, or values or ideologies, underlying all the scattered pieces of different statutes or judicial decisions, rendering them into a whole cloth. The unifying element of all the legal pieces of a legal system that go under the name of social law is not that they have an impact on or deal with one single phenomenon (*e.g.* environment); the unifying element is that they all pursue one single ideal picture how society should appear.⁶⁰ As pointed out by Hayek,

[The word 'social'] has in fact become the most harmful instance of what... some Americans call a 'weasel word'. As a weasel is alleged to be able to empty an egg

features usually ascribed by the critiques to the social legal apparatus (*e.g.* its over-bureaucratization and its use mainly as social engineering tool).

58 See James Cameron, *Globalization and the Ecological State*, Review of European Community and International Environmental Law 8: 245 (1999): "Every traditional legal discipline can be the domain of the environmental lawyer." See also Zygmunt J. B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, Loyola of Los Angeles Law Review 27: 94-99 (1994), where the regulation of environmental issues before the institutionalization of the new field known as environmental law is very similar to the one of the social issues pre-social law (*e.g.* dominance of the market and its economic logic).

59 See Boaventura De Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, Law and Society Review 5: 11, note 4 (1977).

60 See Kennedy, *The Disenchantment of Logically Formal Legal Rationality, Or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, Hastings Law Journal 5: 1034 (2004): "Their basic idea was that the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of 'interdependence'... The crises of the modern factory (industrial accidents) and the urban slum (pauperization), and later the crisis of the financial markets, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence. From this 'is' analysis, they derived the 'ought' of a reform program."

without leaving a visible sign... a weasel word is used to draw the teeth from a concept one is obliged to employ, but from which one wishes to eliminate all implications that challenge one’s ideological premises.⁶¹

The common point for these pieces of criminal law, procedural law or business law can be defined as the object for a “social” lawyer or legal scholar, consisting of the fact that law-makers, judges and doctrine attempt to “legalize” different aspects of social relations which by traditional the legal disciplines (*e.g.* contract law or “old” family law) left to internal regulation or other types of normative systems (*e.g.* morals or religion). This area of law is specifically defined as social because it attempts, through the regulation and control by unifying all these scattered pieces dealing with completely scattered issues of individual and collective life, to remove such issues from other kinds of communal regulations (*e.g.* religious community). Social law aims at putting these aspects of individual and collective existence instead under the tutoring of what is considered, at least in the modern democracy, the “societal” form of regulation and control *par excellence*, namely the positive law.⁶²

3 Social Law as the Welfare State’s Law

What does it actually mean that social law is that kind of law that promotes the “socialization” of certain sectors of human life or, in other words, the transferring of certain parts of an individual’s life from community regulation to legal regulation?

The connection between socialization by legal rules of certain parts of individual or collective life, and the rejection of community rules previously regulating them, is not simply a fortuity. One should begin with the distinction developed by Ferdinand Tönnies, among others, and typical of all modern forms of collective life. According to Tönnies, within the forms of human association, it is possible to distinguish between two basic and ideal typical models: “community” (in German, *Gemeinschaft*) and “society” (in German, *Gesellschaft*).⁶³ With the first, Tönnies refers to the types of organizations based on the sharing among its members of the same moral or other kind of values, *i.e.* the “consciousness of belonging together and the affirmation of the condition of

61 Hayek, *Wissenschaft und Sozialismus* 16 (Freiburg: Walter Eucken Institute, 1979).

62 See Habermas, *Law as Medium and Law as Institution*, *supra* at 216-217, as to the tendency of the law in modern times to “colonize the lifeworld,” *i.e.* to occupy and “destroy” autonomous regulations of non-legal areas such as family life. See also Ewald, *A Concept of Social Law*, *supra* at 52-54 and his idea of social law as the tool for the recognition in the legal world of collective interests (*e.g.* of workers, single mothers, the poverty-stricken, consumers), a fundamental element in order to have a true “democratic government.”

63 See Tönnies, *Tönnies: Community and Civil Society* 17-19 (Cambridge: Cambridge University Press, 2001). See also Gurvitch, *The Problem of Social Law*, *supra* at 23, where the author outlines two fundamental forms of sociality: by “partial fusion in we” (sociality by interpenetration) and by “relation with others” (sociality by interdependence).

mutual dependence.”⁶⁴ Typical examples are religious communities, the family or a neighborhood.⁶⁵

With society is meant instead a (or some) kind(s) of organization of a “mechanical” nature, such as corporations or a state. In these, members do not share values but objective qualities, such as belonging to a legal structure known as a “State” simply by having a certain legal quality known as citizenship.⁶⁶ It then is almost paradoxical that the first mention of social law as a specific legal area during the 19th century was done for the purpose of promoting normative regulations coming from the very bottom of a social pyramid, i.e. what Tönnies would have probably defined as community.⁶⁷ This “community law” was to be promoted in contrast to the positive law (*e.g.* statutes and judicial decisions), which was accused of not reflecting the needs and interests of the entire national community, and identified as the product of a small, economic-political elite dominating the major law-making and law-enforcement agencies.⁶⁸

The modern form of state, however, went through a fundamental change from the end of 19th century throughout the entire 20th century, moving from being a bourgeois liberal state, where decisions were taken by a small group of citizens, usually representing a specific economic, cultural or racial group, to a more democratic state, where (at least from a legal perspective) all the citizens (regardless sex, race, or economic position) had the right and possibility to decide (directly or indirectly) and participate in the shaping and composition of major law-making and law-enforcement agencies.⁶⁹

64 Tönnies, *The Concept of Gemeinschaft*, in W. J. Cahnman and R. Heberle (eds.), *Ferdinand Tönnies On Sociology: Pure, Applied, and Empirical. Selected Writings* 69 (Chicago: The University of Chicago Press, 1971).

65 See Tönnies, *Tönnies: Community and Civil Society*, *supra* at 24-25, 36, 43-46.

66 See *id.* at 61-62, 66, 249. Though different in many aspects, the parallel and also classic distinction should be noted between societies based on “status” (communalism) and those based on “contract” (individualism) as formulated by Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas* 165 (New York: Dorset, [1861] 1985); or the two forms of solidarity, namely “mechanical” (based on likeness and normative consensus) and “organic” (based on functional interdependence) and their law’s typology, namely *repressive* (penal) law and *restitutive* (mainly contract, but also constitutional, procedural, and administrative) law, respectively, as depicted by Durkheim, *The Division of Labor in Society*, *supra* at 69-70.

67 See Tönnies, *Tönnies: Community and Civil Society*, *supra* at 247-248. See also Gurvitch, *The Problem of Social Law*, *supra* at 29, where Gurvitch identifies general “social law” as expressing the sociality by “partial fusion,” i.e. a type of normative system (often alternative to the positive law) somehow coming nearer to Tönnies’ “community law;” Tönnies, *Tönnies: Community and Civil Society*, *supra* at 186-187; Eugene Ehrlich, *The Sociology of Law*, *Harvard Law Review* 36: 100 (1922); and Ehrlich, *Fundamental Principles of the Sociology of Law* 493 (Cambridge: Harvard University Press, 1936), and his idea of the “living law... [as] the law which dominates life itself even though it has not been posited in legal propositions.”

68 See Tönnies, *Tönnies: Community and Civil Society*, *supra* at 187, 193-195.

69 See Reinhard Bendix, *The Extension of Citizenship to the Lower Classes*, in R. Bendix et al., *State and Society: A Reader in Comparative Political Sociology* 254-255 (Boston: Little, Brown and Co., 1973). As an historical example of the bourgeois liberal ideology towards mass-democracy, see Pierre Rosanvallon, *Le Moment Guizot* 75-86, 132-140 (Paris:

This led to a progressive consolidation of a “societal” form of organization, where membership is determined only according to objective criteria, such as attaining the age of 18 years or being born within a national territory.⁷⁰ Moreover, one can notice a parallel growth and final establishment of an ideology of democracy as the only legitimized form of political organization.⁷¹ As a consequence, the law-making of a democratically elected national assembly or in general, all the political or legal actors legitimized directly or indirectly by a popular election, came to represent the highest form of expression of the “true” and only community, namely the one of citizens.⁷²

In other words, “society’s” law, i.e. positive law (mostly in statutory form), has become the only legitimized form of regulation because it is considered the only true expression of the will of the only community that counts in a modern state, namely the community of citizens.⁷³ As a consequence, to “socialize” a certain part of individual or collective life, like aging or education, can be done not by making use of an “undemocratic” normative system, as for example, that expressed by a religious or moral group. “Socialization” means to put parts of individual or collective life and choices under the guardianship of society, and therefore, under the guardianship of the tool which, in the modern state, better than other normative systems can express the will of the national community: the positive legal system.⁷⁴

Gallimard, 1985). *But see* Carl Schmitt, *Verfassungslehre* 319 (Munich: Duncker and Humblot, 1928) and Habermas, *Legitimation Crisis* 123-124 (Boston: Beacon Press, 1975), describing both authors as showing the tendency inside the democratic society and respectively its theoreticians towards a “democratic rule by elites” (*id.* at 124). *Cf.* Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 295-298 (New York: W. W. Norton and Company Inc., 2nd ed., 1979).

70 *See* Poggi, *The Development of The Modern State: A Sociological Introduction* 97, 122-125 (Stanford: Stanford University Press: 1978).

71 *See, e.g.*, Ulrich Beck, *Democracy Without Enemies* 1-18 (Cambridge: Polity Press, 1998); and Giovanni Sartori, *Democrazia: Cosa è* 267-272 (Milan: Rizzoli, 1993).

72 *See* Habermas, *Between Facts and Norms*, *supra* at 263-264, 297-298. As a classical example of this ideology equating the government’s will with the population’s will, *see* the French *The Declaration of the Rights of Man and of the Citizen* (1789), Article VI: “The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation.” *See also* Ewald, *A Concept of Social Law*, *supra* at 58. *But see*, for a general skepticism about this equation in the Anglo-Saxon world and its historical underpinnings (*e.g.* the American Federalist ideas or the English *Magna Carta*), Akhil Reed Amar, *On Sovereignty and Federalism*, *Yale Law Journal* 96: 1429-1466 (1987).

73 *See* Habermas, *Between Facts and Norms*, *supra* at 110, 171-172. *See also* Tönnies, *Tönnies: Community and Civil Society*, *supra* at 251: “Instead of many varied fellowships, communities and commonwealths that have grown up organically, the only remaining actors are the state and its departments on the one hand, the individual on the other.”

74 *See* Habermas, *Between Facts and Norms*, *supra* at 271 (under the definition of “republicanism”). *See, e.g.*, Kenneth L. Karts, *Law, Cultural Conflict, and the Socialization of Children*, *California Law Review* 91: 971-989 (2003) where the author shows the use of adoption law and judicial decisions as fundamental tools in order to control individual choices (namely to live in a same-sex relation and adopt a baby), otherwise left to other normative systems (*e.g.* morals). *See also* Ewald, *A Concept of Social Law*, *supra* at 57-58.

The root of the specific function-as-purpose of social law, i.e. its socializing function or what makes social law "social," can be traced back to the very birth of this specific area of law. Social law begins as an autonomous area of operation and investigation almost in parallel with the birth of the Welfare State, in particular in form of constitutionalized (either by a specific constitutional article or by Supreme Court decision) social rights to then be implemented regardless of the political parties in power.⁷⁵ A major goal of this form of social, political, and economic organization is to actively intervene through a large apparatus of state or state-financed agencies and to regulate, mostly through legislative measures, every aspect of the lives of the members of a certain national community: "The essence of the welfare state is government-protected minimum standards of income, nutrition, health, housing, and education, assured to every citizen as *social right*."⁷⁶

As pointed out by Norberto Bobbio and Vilhelm Aubert, that the government uses the law in order to implement such social right to its full potential, i.e. not only to discourage certain patterns of social behaviors but also to encourage others is typical of the Welfare State.⁷⁷ This is done in order to provide every human being with a true possibility to fulfill himself or herself, to insure to

Ewald also points out the paradox that the Welfare State has been aiming at replacing the "societal" contract with "communal" solidarity but did so by shaping every social relation in forms of contract (e.g. more contractualized labor relations in order to protect the weaker parties or standardized contracts in favor of consumers). "In brief, the generalised conversion of social relations into contractual ones would finally enable society to coincide with itself." *Id.* at 50.

75 See Habermas, *Between Facts and Norms*, *supra* at 410. See, e.g., the *Constitution of the Weimar Republic* (1919) and its articles 151-165; or the US Supreme Court decision in *Goldberg v. Kelly*, 397 US 265 (1970) and *Mathews v. Eldridge*, 424 US 319 (1976) expanding the Fourteenth Amendment requirement of "due process" to welfare entitlement and social security benefits, respectively. As to the structural connection between social law and Welfare State, see also Paul Pierson, *Dismantling the Welfare State?: Reagan, Thatcher and the Politics of Retrenchment* Ch. 3-5 (Cambridge: Cambridge University Press, 1994), where the author discusses the attempts by the governments of Margaret Thatcher and Ronald Reagan to reduce the range of the operation of the Welfare State mainly by reducing the range of the operation of the social legislation.

76 Harold Wilensky, *The Welfare State and Equality: Structural and Ideological Roots of Public Expenditure* 1 (Berkeley: University of California Press, 1975) [*italics added*].

77 See Bobbio, *The Promotion of Action in the Modern State*, in G. Hughes (ed.), *Law, Reason and Justice: Essays in Legal Philosophy* 199-202 (New York: New York University Press, 1969); and Aubert, *The Rule of Law and the Promotional Function of Law*, *supra* at 32-39. Even Foucault admits that, in modern societies, law attempts (though mostly unsuccessfully) to regain control of other normative systems ("disciplines") by "recod[ing] them in the form of law." Foucault, *The History of Sexuality: An Introduction*, vol. 1 109 (New York: Pantheon Books, 1978). See also the concept of "juridification of welfare" as in Hartley V. Dean, *The juridification of welfare: Strategies of discipline and resistance*, in A. Kjonstad and J. Wilson (eds.), *Law, Power and Poverty* 3-27 (Bergen: CROP Publications, 1997). See, e.g., Dennis Davis, *Refusing to step beyond the confines of contract*, *International Law Journal* 6: 433 (1985) and his idea of juridification of labor law as "the use of law to steer labour relations in a particular direction so as to reduce the freedom of action of employees and employers in shaping relations at work."

everybody the same material possibilities in different moments of life: at work, at education, or in the family.⁷⁸

This is the basic ideology of the Welfare State, and already from the birth of the nation state in general, the law is considered as the primary and highest legitimized tool at the disposal of political actors to implement their program.⁷⁹ It is then not a coincidence that a special kind of law was created specifically to implement these ideas in so different areas, traditionally left either to other forms of regulation (e.g. morals) or to more traditional branches of law, such as commercial law or administrative law. A new form of political organization such as the Welfare State required a new form of law, namely social law, in order to be able to penetrate and make legally relevant, and therefore give more control to political steering, areas before left almost untouched by the legal system.⁸⁰

The political organizational form known as the Welfare State has enormously increased the extension of the social landscape whose elements are essentially determined by law.⁸¹ One of the constitutive components of the Welfare State is the fact that it is the very law that has the primary function more and more of shaping the basic components of society, a function that also goes

78 See Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 194 (New York: The Free Press, 1977), characterizing the law in the Welfare State as shifting the target from formal justice to substantive justice. See also Habermas, *Between Facts and Norms*, *supra* at 388-391, speaking of a shift in the "paradigms of law;" Peter Flora, Introduction, in P. Flora (ed.), *Growth to Limits: The Western European Welfare States since World War II. Vol. 1 Sweden, Norway, Finland, Denmark* xii (Berlin: de Gruyter, 1986); and Ewald, *A Concept of Social Law*, *supra* at 43, speaking of social law as symbolic for a transition from "the liberal political rationality that dominated the nineteenth century... to a rationality of the solidaristic type."

79 See Friedman, *Introduction*, *Theoretical Inquiries in Law* 4: 446 (2003). See also Ewald, *A Concept of Social Law*, *supra* at 61, 63 and his idea of "balance" as the main criterion steering social law-making. But see Santos, *Toward a New Legal Common Sense: Law, Globalization, And Emancipation* 54-55 (London: Butterworths, 2nd ed., 2002), speaking of a revival of *Gemeinschaft* and its non-legal normative systems in order to explain the privatization of social welfare.

80 See Friedman, *Legal Culture and the Welfare State*, in G. Teubner, *Dilemmas of Law in the Welfare State*, *supra* at 18-19. See also Regina Austin, *The Problem of The Legitimacy of The Welfare State*, *University of Pennsylvania Law Review* 130: 1511-1512 (1982); Thomas H. Marshall, *Citizenship and Social Class*, in T. H. Marshall, *Sociology at the Crossroads and Other Essays* 74 (London: Heinemann, 1963) as to the connection between Welfare State and the implementation of social rights; and Ewald, *A Concept of Social Law*, *supra* at 46: "Social law seeks to be an instrument of intervention which is to serve to compensate and correct inequalities."

81 See Friedman, *The Republic of Choice*, *supra* at 65. A strong criticism (but not denial) of the juridification of the social arena under the Welfare State can be traced in Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in G. Teubner, *Dilemmas of Law in the Welfare State*, *supra* at 299, 310-312. In particular, Teubner stresses the risks for an "over-legalization" of society (e.g. the risk of destroying traditional patterns of social life). See, for a rebuttal of such *per natura* incongruence among politics, law and society (at least in the Common law systems), Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, *Michigan Law Review* 87: 1651-1652, 1683-1685 (1989).

under the guise of “social engineering.”⁸² This phenomenon of the absorption of the social arena into the legal world is part of a general tendency of contemporary law: the *legalization of society*.⁸³ As defined by Friedman, the legalization of society entails that “there are fewer zones of immunity from law – fewer areas of life which are totally unregulated, totally beyond the *potential* reach of law.”⁸⁴

Social law in particular becomes that area of law with the function-as-purpose to create *juridical fields* where there were none before.⁸⁵ As pointed out by Bourdieu, in modern society:

[T]he juridical field is a social space organized around the conversion of direct conflict between directly concerned parties into juridical regulated debate between professionals acting by proxy... entry into the juridical field implies tacit acceptance of the field’s fundamental law... conflicts can only be resolved *juridically* – that is, according to the rules and conventions of the field itself.⁸⁶

Social law therefore is characterized by its purpose of “socializing” by law or, in Bourdieu’s terminology, of creating “juridical fields” by incorporation under the monopoly of the law-making and law-enforcement state agencies, of issues and

82 See Pound, *Social Control Through Law* 63-65 (London: Transaction Publishers, [1942] 1997); and Pound, *The Lawyer As A Social Engineer*, *Journal of Public Law* 3: 292-295, 299-301 (1954). See also Ewald, *A Concept of Social Law*, *supra* at 58 where social law is defined as “an instrument for the sociological administration of society.” But see Foucault, *The History of Sexuality*, *supra* at 87. In particular, Foucault points out how the legalization of political power is a typical feature of pre-modern societies, since “[i]n Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.” However, in modern times “the instruments of government, instead of being laws, now come to be a range of multiform tactics... *law is not what is important.*” Foucault, *Governmentality*, *Ideology and Consciousness* 6: 13 (1979) [italics in the text].

83 See Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, *Modern Law Review* 55: 13-14 (1992). See also Friedman, *Total Justice* 147-152 (New York: Russell Sage Foundation, 1985) and, as the more general tendency in Welfare State of “objectifying” through law areas of social life, Habermas, *The Theory of Communicative Action. Vol. Two: Lifeworld and System: A Critique of Functionalist Reason* 369 (Boston: Beacon Press, 1987).

84 Friedman, *The Republic of Choice*, *supra* at 15 [italics in the text]. See also Luhmann, *Law as a Social System*, *supra* at 273; and Antonie A. G. Peters, *Law as Critical Discussion*, in G. Teubner, *Dilemmas of Law in the Welfare State*, *supra* at 252-254.

85 See Bourdieu, *The Force of Law*, *supra* at 816-817. See also Mikael Rask Madsen and Yves Dezalay, *The Power of the Legal Field: Pierre Bourdieu and the Law*, in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* 189-204 (Oxford: Hart Publishing, 2002). See, e.g., Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* part 2 (Chicago: University of Chicago Press, 1998); or Klare, *The Public/Private Distinction in Labor Law*, *supra* at 1358 as to the legal discourse’s performative role in shaping contemporary society.

86 Bourdieu, *The Force of Law*, *supra* at 831. See, e.g., Nick Wikeley, *Burying Bell: Managing the Judicialisation of Social Security Tribunals*, *Modern Law Review* 63: 487-493 (2000), where the author shows as one of the feature of Welfare State’ social law the moving towards social security tribunals formed by legally trained people instead of lay persons.

solutions previously in the domain of other normative systems such as a neighborhood's mores as to children's issues or the religious value-system as to charity or the "economic rules" as to the labor (employment) or housing markets.⁸⁷ As pointed out by Kennedy, the legal category of "the best interest of the child" implies, for example, an idea of "parents as a mere adjunct or subagency of the state."⁸⁸

"Socializing by law" in its turn has an ideal model of society in mind, namely an organization where uncertainty in life for of all its members (from the child, to the unemployed woman to the retired person) is drastically reduced by formalizing the risks and remedies in the law or, in Luhmann's words, by "attempt[ing] to anticipate, at least on the level of expectations, a still unknown, genuinely uncertain future."⁸⁹ Only by looking at this goal of reduction of uncertainty, characterizing the life of each individual in her or his professional or personal relations with other individuals, can one understand, for example, the logic behind a recent proposal of producing legal regulations in order to promote and protect friendship, i.e. a type of relation whose expectations traditionally have been left to other normative systems, like morals and social customs.⁹⁰

However, this process operating on the law and society relations is not unilateral; there is a counterforce attempting to balance the incorporation of larger and often scattered segments of society into juridical fields. This counterforce, also typical in general of the legal phenomenon in the Welfare State, can be defined as the socialization of law.⁹¹ The presence of several factors (e.g. a legal ideology inspired by socio-legal studies or by feminist

87 See Bourdieu, *The Force of Law*, *supra* at 819-820, speaking of the "appropriation effect" of the legal language. See also John Henry Merryman, *Legal Education There and Here: A Comparison*, *Stanford Law Review* 27: 867 (1975). As stressed by Ewald, social law's "novelty lies not so much in the content of the rights it grants as in *its ways of bringing the conflict under the law*." Ewald, *A Concept of Social Law*, *supra* at 48 [italics in the text]. This idea of social law as a "new" kind of law more for the methodologies of its operating than for its content is a constant (though somehow minor) pattern in the social law literature, starting already in the 1920's. See, e.g., Oscar L. Boulanger, *Notes On Social Law*, *Canadian Law Times* 40: 400 (1920).

88 Kennedy, *The Stages of the Decline of the Public/Private Distinction*, *supra* at 1356. See also the critique in Habermas, *Law as Medium and Law as Institution*, *supra* at 211 ("While welfare state guarantees are intended to serve the goal of social integration, they nevertheless promote the disintegration of life relations"). See, e.g., Prondzynski and Ada Kewley, *Social Law in the European Union*, *supra* at 271-272, pointing out the shifting in the United Kingdom from "parents' rights" to "parental responsibility," a responsibility formally towards the children but in practice towards the supervising state agencies.

89 Luhmann, *Law as a Social System*, *supra* at 147. See also Friedman, *Legal Culture and the Welfare State*, *supra* at 24-25. See, e.g., Ewald, *A Concept of Social Law*, *supra* at 42-43, as to the shifting with the first labor legislation in France from employer-employee relations based on factual risk (in case of occupational accidents during work) to the new idea of the "labor contract" as a legal settlement, where the worker is always legally entitled to compensation in case of accidents during work but only according to a predetermined scale.

90 See Ethan J. Leib, *Friendship and the Law*, *UCLA Law Review* 54: 684-705 (2007).

91 See Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *supra* at 40 (in particular point 4).

jurisprudence) can deeply affect the daily work of legal actors.⁹² This conditioning usually expresses itself by incorporating into the very constitutive elements of the law elements that necessarily find their explanation in other normative systems and knowledge.⁹³

As social law is a product of the Welfare State, it then is no surprise that in this very branch of law, this counterforce making the law more social, paradoxically enough in the sense of a less "socializing" function, is particularly evident.⁹⁴ For example, this can be the case when a statute chooses the legal paradigm of "in the best interest of the child" as the paramount criterion when resolving marital divorce issues.⁹⁵ Here, for different reasons (*e.g.* a highly conflictual situation inside the community or the higher degree of legitimacy granted by the community to other types of knowledge), the choice is made by the law-making (and often also the law-enforcement) state agencies with the very purpose of delegating to other normative or knowledge systems a part of the solution of the issues the social law is unable to deal with as a legal system.⁹⁶ Using the previous example, in order to find the actual meaning of the legal paradigm "the best interest of the child", it then is essential to take into consideration normative systems (like the dominating morals in a certain society) or branches of investigation (like the recent development of child-psychology) located outside the monopoly of juridical fields by legal actors.⁹⁷

92 See Pound, *The End of Law as Developed in Legal Rules and Doctrines*, Harvard Law Review 27: 225 (1914).

93 See, *e.g.*, Kennedy, *The Structure of Blackstone's Commentaries*, Buffalo Law Review 28: 211-212 (1979); or John Finnis, *Natural Law and Natural Rights* 282 (Oxford: Clarendon Press, 1980).

94 See, *e.g.*, Gustav Radbruch, *Vom individualistischen zum sozialen Recht*, Hanseatische Rechts- Und Gerichts-Zeitschrift 13: 461 (1930), where the author characterized modern law in general as a "permeation of individual private rights with social obligation." See also Ewald, *A Concept of Social Law*, *supra* at 55-57. According to Ewald, however, the socialization triggered by social law is mainly due to its procedural provisions, *e.g.* by imposing the solution of labor conflicts being reached through collective bargaining and agreements, conciliation, arbitration and mediation. In this way, continues Ewald, social law enforces by law "a whole range of practices aimed at allowing 'society' continually to reach a compromise with itself, to bring forth its own law." *Id.* at 56-57.

95 See Nancy B. Shernow, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-divorce Family in Child Custody Modifications Proceedings*, UCLA Law Review 35: 682-684 (1988); and the *Convention on the Rights of the Child* Art. 3, Point 1 (adopted by the United Nation General Assembly resolution 44/25 of 20 November 1989, entry into force from 2 September 1990).

96 See Hart, *The Concept of Law*, *supra* at 131.

97 "[B]road and discretionary standards for child-protection invite decisions based on the values of the particular judges and state officials responsible for a particular case." Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, Law and Contemporary Problems 39: 267 (1975). See, as to a similar use of socializing concepts for introducing into the family law non-legal normative systems, Jacob Sundberg, *Recent Changes in Swedish Family Law –Experiment Repeated*, American Journal of Comparative Law 23: 46-47 (1975). See also Ewald, *A Concept of Social Law*, *supra* at 65-67; and Ewald, *Justice. Equality. Judgement: On 'Social Justice'*, in G. Teubner (ed.), *The Juridification of Social Spheres*, *supra* at 104, 109; and Mary Ann Glendon, *The*

This *socialization* of the law is actually part of a more general process where, “[i]n our own period, [legal actors] are somewhat more likely to throw in references to other kinds of authority including ethical, economic, or social norms.”⁹⁸

The idea of a structural connection between social law and the law in general in the Welfare State is not only traceable in the very meaning behind the word “social”, but is also reinforced by some other elements typical of this legal discipline. First, as recently pointed out by Peer Zumbansen, one of the typical features for social law can be traced in its crossing over the traditional distinction between public and private legal regulations.⁹⁹ More than in other legal fields (*e.g.* contract law), social law tends to dismantle the dualism between private law and public law, a dualism typical instead of the classical liberal political and legal ideology.¹⁰⁰ This disruption of the dualism of public *vs.* private is the effect brought by social law into the legal arena of a more general feature of the political program of the Welfare State: the occupation by the public discourse of those areas of human relations until then considered the domain of the private discourse, from family matters to employer-employee relations.¹⁰¹

Transformation of Family Law: State, Law, and Family in the United States and Western Europe 2 (Chicago: University of Chicago Press, 1989), stressing the contradictory tendency in the modern Welfare State as to the family issue, *i.e.* of more de-regulated areas and at the same time of more power to the public authorities for intervening in family issues.

98 Friedman, *Taking Law and Society Seriously*, *Chicago-Kent Law Review* 74: 535-536 (1999). *See also* Pound, *The Ideal Element in Law* 167-168 (Calcutta: Calcutta University Press, 1958); and Jules Coleman, *Rules and Social Facts*, *Harvard Journal of Law and Public Policy* 14: 724 (1991). This idea of “socialization” in law should not be confused with “legal socialization” as developed by the sociology of law and intended as the “processes by which commitment to law is developed in the individual.” Cotterrell, *The Sociology of Law*, *supra* at 141; Aubert, *Elements of Sociology* 91 (New York: Charles Scribner's Sons 1967); and Chantal Kourilsky-Augeven, *Socialisation juridique et modèle culturel: l'image du droit en Russie et en France*, in C. Kourilsky-Augeven, *Socialisation juridique et conscience du droit* 17 (Paris: Librairie générale de droit et de jurisprudence, 1996).

99 *See* Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* 204 (Baden-Baden: Nomos, 2000). *See also* Habermas, *Between Facts and Norms*, *supra* at 392-408. *See, e.g.*, the construction of the Welfare in the United Kingdom with the combined use of private law measures (*e.g.* contract law and torts law) and traditional public law channels (*e.g.* cash benefits for maternity leave), as in Partington, *The Juridification of Social Welfare in Britain*, *supra* at 427-433.

100 *See* Horwitz, *The History of the Public/Private Distinction*, *University of Pennsylvania Law Review* 130: 1424-1425 (1982), where the author stresses the legal turning points where the market ideology created the distinction between public and private law during the 19th century. *See also* Hayek, *Law, Legislation and Liberty*, *vol. 1*, *supra* at 142-143, according to whom the “socialization of law” typical of the Welfare State simply indicates a transfer internal to the legal system, namely from regulation mainly through private law to regulation mainly through public law.

101 “The welfare state has cast its regulatory net over almost every dimension of private life, influencing behavior through regulations on tax, bankruptcy, welfare, health, education, and agriculture. Religion, too, is influenced by the growth and pervasiveness of regulatory bureaucracy.” Anthony E. Cook, *God-talk in a Secular World*, *Yale Journal of Law and the Humanities* 6: 440 (1994) (book review). *See also* Habermas, *Between Facts and Norms*, *supra* at 314. In Weber’s terminology, one can say that social law allows the “law of subordination” to the public authorities to intrude into that previously considered the

Another element typical of social law and which emphasizes its being “the” legal discipline of Welfare State, is its sources, at least if seen from a legal perspective. While for Civil Law countries is quite normal that a legal discipline originates mostly in legislative measures, when moving to Common Law system it can be noticed how a peculiarity of social law is its original roots mostly in statutory provisions, i.e. non-judge made law. Exemplary in this sense is the fact that the term often employed for social law in the United Kingdom is the one of “Welfare state *legislation*.”¹⁰² This peculiarity of identifying social law with state law-making is due to the fact that, at least in the beginning, social law was intended to be the instrument in the hands of “enlightened” legislatures to implement their Welfare programs by realigning by statute the legal system to the mutated social and economic conditions.¹⁰³ In Friedman’s words, the tendency particularly in welfare matters has always been the same from the very beginning: “power has gravitated toward the center,” i.e. toward legislative bodies more willing and capable of creating a safety-net society than the individualist and conservative attitude of the common law produced by conservative judges.¹⁰⁴

In summary, social law is the product of a specific form of political organization, namely the Welfare State. Social law therefore tends, more than other traditional areas of law, to mirror in its “socializing and socialized” purposes, in its “in-between” nature and its legislative modalities, the forces and counterforces under which the law in general is placed in the Welfare State.

4 Conclusion

The purpose of this article has been the disclosure of what is meant by social when, in the contemporary legal discourse, one refers, uses or investigates “social” law. Part One showed how, in contrast to other more traditional legal

domain of “law of coordination” among private individuals. See Weber, *Economy and Society*, *supra* at 642.

102 See Otto Kaufmann, *Le droit social comparé*, *Electronic Journal of Comparative Law* 8: 10-11 (2004) [*italics added*].

103 A classical case in this respect is the famous conflict between the “progressive” Roosevelt’s administration and its New Deal’s program of social welfare, in particular through the National Industrial Recovery Act (1933), and the “conservative” Justices sitting in the Supreme Courts, striking it down with the decision in *Schechter Poultry Corp. v. United States*, 245 US 495 (1935). See, e.g., Friedman, *American Law in the 20th Century* 3, 546 (New Haven: Yale University Press, 2002). See also Cotterrell, *The Sociology of Law*, *supra* at 161-166. However, as to Civil Law countries, see Luhmann, *Law as a Social System*, *supra* at 472, speaking of a structural change in the legal system due to the political program of the Welfare State, namely towards a vague legislation affixing the goals and activist courts finding better ways to implement them instead.

104 Friedman, *American Law in the 20th Century*, *supra* at 598. See also Hayek, *Law, Legislation and Liberty*, vol. 1, *supra* at 141. See, e.g., US Supreme Court’s decision in *Berman v. Parker*, 348 US 32 (1954); and Paul Davies and Mark Freeland, *Labour Legislation and Public History: A Contemporary History* 24 (Oxford: Clarendon Press, 1993), as to the use of labor legislation against the individualistic aspect of common law.

disciplines, the label “social” in social law cannot be considered as identifying a specific object of a specific type of legal regulation known as social law. Law in general regulates social relations and therefore law in general is “social” in this sense.

By making use of a sociological distinction between *functions-as-effects* of law and *functions-as-purposes* of law, Part Two stressed the fact that the label “social” does not indicate the outputs or impacts the social law targets in a certain legal system. Instead “social” indicates the purposes or values behind the use of law for regulating by law certain types of relations. This basic purpose is the one of “socializing” certain areas of human life historically regulated by non-state normative systems, i.e. the purpose of putting such areas under control of the actors which, in the modern ideology of democracy, best represent the society: the political actors and their positive law.

The final Part Three identified a possible historical and legal theoretical explanation of this specific feature of the discipline of social law. With the use of the idea of “juridical fields,” how social law finds its life-blood in its socializing function, i.e. the law-making and law-applying agencies’ purpose of legalizing the society or, in other words, of monopolizing and somehow controlling by law the entire spectrum of individual and collective relations, is examined. This however remains a tendency, being that the Welfare State is also characterized for its making the law in general, and the social law in particular, more *socialized*, i.e. necessarily open in some of its elements to non-legal normative and knowledge systems.

To conclude, the next time a social lawyer or a social legal scholar is then asked what she or he is working with, a better answer probably is to state that social law cannot be defined by a lengthy catalogue of legal areas it touches upon, running from procedural law to welfare law; nor can social law be identified by using extremely vague and therefore analytically useless goals such as “all those areas of social policy that are designed or intend to assist or enhance the quality of life of those groups or individuals in society who can be described as disadvantaged.”¹⁰⁵ Instead, he or she can answer that social law is that part of the law with the specific purpose of placing under social control by law different areas of human relations that traditionally have been left to the guardianships of non-legal forms of regulation and control. Social law, in other words, is not only the law *of* modern society; social law is also the law *for* modern society.

105 Partington, *The Juridification of Social Welfare in Britain*, *supra* at 422. See also Foucault, ‘*Omnès et singulatim*’: *vers une critique de la raison politique*, in D. Denfert and F. Ewald (eds.), *Dits et écrits (1954–1988)*, vol. 4 (1980–1988) 144 (Paris: Gallimard, 1996), where social law is that part of positive law that aims to “permanently safeguard the lives of each and every person, help them and improve their lot.”