The Future of Labour Law from a European Perspective

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1. Introduction

In Europe, not only is the ‘future of work’ uncertain, but so is the future of labour law. It is possible to identify what the International Labour Organisation (ILO) Director-General Guy Ryder described in 2015 when launching the ILO Future of Work Initiative as the ‘current world of work dynamics’. However, in Europe (at least) there are no definitive predictions as to their outcomes, for example regarding their potential impact on such crucial matters as the extent of the rise of a ‘gig’ economy, susceptibility to unemployment, or the necessity to introduce a universal basic income. Even were we to possess a crystal ball, there is arguably no single ‘necessary future consequence’ for labour law in Europe, but rather a range of alternative potential futures, which are currently the subject of active debate and review, and may play out in different ways in different countries. Much depends on the processes of deliberation (and arguably confrontation) which affect legal change.

A. Identifying a ‘European Perspective’

I should begin by clarifying what I mean by a ‘European’ perspective. In this paper, I will be drawing on the policies, laws, supervisory and other activities conducted primarily by two

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2 Ibid.

3 Katie Bales, Harry Pitts and Huw Thomas, ‘From the future of work to futures of work’ available at: https://futuresofwork.co.uk/2018/09/05/editorial-from-the-future-of-work-to-futures-of-work/.
European organisations, the European Union (EU)⁴ and the Council of Europe. The former currently consists of 28 Member States, while the latter has a broader membership of 47 countries including former Soviet States, such as Russia and the Ukraine, as well as States arguably at the border of Asia, such as Turkey and Azerbaijan. It is evident then that a broad range of heterogeneous States arguably come with the loose definition of what is ‘European’.

The Council of Europe is an intergovernmental organisation, which has been long associated with protection of human rights primarily by virtue of promulgating what has become known colloquially as the European Convention on Human Rights (ECHR)⁵ and the European Social Charter.⁶ The Council of Europe has also adopted significant instruments on matters such as protection of national minorities and human trafficking.⁷ It could be argued that the Council of Europe operates as a normative touchstone for its Members, and even for the EU as is evident from the EU treaties (namely its constitutional documents into which an EU Charter of Fundamental Rights is now incorporated as a check on the activities of EU institutions or Member States when implementing EU law).⁸

The EU is of particular relevance for our purposes as the regional European entity that sets key market rules for movement of goods, services, establishment, and persons (predominantly workers but also others such as dependents and students). In imposing these rules and those relating to competition law, the EU has indirect effects on labour market regulation, but has also developed explicit ‘social policy competence’.⁹ In particular, the EU

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⁴ In earlier incarnations the European Economic Community (EEC) or European Community (EC). The EU website is available at www.europa.eu.  
⁶ For the original texts and amending instruments, see https://www.coe.int/en/web/turin-european-social-charter/charter-texts.  
⁸ The EU Charter of Fundamental Rights which draws on the ECHR (referred to in Art.6 of the EU Treaty) and reference to the ESC in Art. 151 of the Treaty on the Functioning of the European Union (TFEU).  
⁹ See the Social Policy Title of the TFEU.
Commission has been active in labour law reform and promotion of social sustainability concerns both internal to the EU and in its external relations.

However, the EU also remains radically unsure of its future mission and objectives. So much is evident from the *White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025* issued by Jean-Claude Juncker on 1 March 2017,\(^\text{10}\) which sets out five alternative scenarios: (1) ‘carrying on as is’ (despite an apparent lack of trust and confidence from European citizens); (2) limiting its remit to ‘nothing but the single market’ so as to reduce the scope of its mission and operations, leaving social policy arguably out of the mix, which could lead to ‘risk of a “race to the bottom”’;\(^\text{11}\) (3) ‘those who want more do more’ doing more, wherever ‘one or several “coalitions of the willing”’ can be found to agree upon a common cause and regulation,\(^\text{12}\) which could mean deepening integration between some Member States on ‘social standards’, but not all;\(^\text{13}\) (4) ‘doing less more efficiently’, setting a very limited number of ‘priority areas’ on which to focus attention (although labour standards are unlikely to be amongst these);\(^\text{14}\) and (5) ‘doing much more together’. Any agreement on a scenario (or a combination of these) is to be ‘rolled out in time for the European Parliament elections in June 2019’.\(^\text{15}\) In the meantime, we cannot be sure whether EU action on labour standards will expand or contract.

In relation to the United Kingdom (UK), the UK is still a member of the EU but is due to exit (or ‘Brexit’) on 29 March 2019 with (as yet) unforeseen consequences – hence the reference to 27 Member States in Juncker’s White Paper. There are no plans at present for the UK to leave the Council of Europe, although the Conservative party has threatened modification (if not abandonment) of the ECHR from time to time.\(^\text{16}\) It follows, therefore, that the UK is by no means an exemplar of European practices, nor is it a nation that can boast of much good

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\(^\text{11}\) Ibid., at 18.

\(^\text{12}\) Ibid., at 20.

\(^\text{13}\) Ibid., at 21.

\(^\text{14}\) Ibid.

\(^\text{15}\) Ibid., at 26.

\(^\text{16}\) For example, the Conservative Party Election Manifesto and policy documents in 2015 indicated that a preference for the judgments of the European Court of Human Rights to be merely advisory, which would entail amendment of UK obligations and of the Convention itself. See Steven Greer and Rosie Slowe, ‘The Conservatives’ Proposals for a British Bill of Rights: Mired in Muddle Misconception and Misrepresentation?’ (2015) 4 EUR. HUM. RTS. L. REV. 372.
practice when it comes to responses to the future of labour law. I will however refer to some UK national level initiatives and to other interesting developments in a number of European States.

B. The approach taken to the ‘European perspective’ in this paper

In addition to the 2015 Report by Guy Ryder, I shall draw on the two reports intended to assist the ILO Commission on the Future of Work: the *Inception Report for the Global Commission on the Future of Work* and the *Synthesis Report of the National Dialogues on the Future of Work*. I will be placing these (and ILO concerns on sustainability issues) in the context of the European sources identified above. It will become apparent that many of the concerns identified by the ILO as pertinent to the future of work have resonance in European institutions and States. Nevertheless, as we might expect, such concerns are addressed only partially and imperfectly, such that there remains considerable scope for reform of European labour laws, whether through the means of supranational instrument and policies, domestic legislation or the work of national and European level courts.

My paper has four parts. The first part will consider what are described in these two reports respectively, as ‘megatrends’ (or ‘mega-drivers for change’) and as (more simply) ‘drivers for change’. These two reports make it seem like these are factors external to the ways in which labour markets operate. However, it is argued here that these phenomena were generated by the ways in which labour law (and other laws) in Europe created and then perpetuated patterns of production, trade and consumption. In other words, European States (diverse as they are) can be said to have had agency here (as have their organisations) and as such are suitable targets for calls for reform.

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20 See n.17 above at 8.

21 Ibid., at 3-6.
The next section is organised around the demarcation of issues so far identified by Ryder as Director-General in 2015,\textsuperscript{22} which have since been repeated in the subsequent 2017 \textit{Inception} and \textit{Synthesis} reports. These consist of the following headings: ‘work and society’, ‘decent jobs for all’, ‘organization of work and production’ and ‘governance of work’. While my approach attempts to be systematic, it arguably suffers from the same flaws as the ILO reports in that it leads to a degree of overlap and repetition, for which I apologise in advance. However, as I was invited to use the ILO documentation as a starting point for my analysis, I thought it helpful to retain this reference point, while perhaps illuminating its limitations.

The final section considers how these European approaches to the future of labour law can be understood within a sustainability paradigm, namely what legal reforms might secure the Sustainable Development Goals (SDGs) set out in the Resolution adopted by the UN General Assembly on 25 September 2015 - \textit{Transforming our world: the 2030 Agenda for Sustainable Development}.\textsuperscript{23} In so doing, I will refer predominantly to SDGs 5, 8, 10, 16 and 17, although I appreciate there are other SDGs which may in various ways be of relevance. Indeed, the SDGs now form part of the EU platform for ‘Policy Coherence for Sustainable Development’,\textsuperscript{24} so could be expected to prompt a new future also for labour-related terms of development aid and trade in EU external relations. I will also suggest that there is an important link here between the ‘governance of work’ to which Ryder points and the protections of collective bargaining under SDG 8 and participatory institutions under SDG 16. The difficulty is that both remain woefully inadequate in Europe. Nor do these problems seem likely to be remedied by adoption of the limited approach to social dialogue (and of endorsement of the right to strike) taken so far in the key ILO documents on the future of work; or by European institutions at the present date. Instead of the positive approach advocated globally, Europe is largely witnessing the threat of retreat into forms of nationalism, xenophobia and isolationism, which if we are not careful could affect the eventual fate of our labour laws.

\textsuperscript{22} See n.1 above.
\textsuperscript{24} See the New Consensus for Development adopted by the EU in June 2017 at Available at: https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf.
2. ‘Megatrends’ and the ‘drivers of change’

The 2017 International Labour Office reports (in different ways and with slightly different emphasis) identify the following to be among ‘drivers of change’: 25

- Globalization;
- Demographics;
- Technology; and
- Climate change and environmental sustainability.

As we shall see, these are presented as external developments which have the capacity to shape working experience and to which there needs to be a comprehensive response.

A. Globalization

A great deal is ‘packed in’ under the broad umbrella term of ‘globalization’ in the *Inception* report, including ‘internationalization of production, finance (including remittances), trade and migration’. 26 The term ‘internationalization of production’ comes from Ryder’s 2015 report and is linked there to supply chains, which affect the scope for corporate responsibility for treatment of workers on multiple sites. Ryder also links to this development ‘migration of increasing numbers of workers in search of work’, highlighting the vulnerability of migrant workers. 27 The issue of ‘financialization’ (a dependence on liquidity and a crash in the event of its failure) also raises the spectre of the global financial crisis, which had particularly harsh effects on certain EU States, such as Greece. 28 Vulnerability to the terms on which foreign direct investment is made (and can be withdrawn), regulated by such international instruments as bilateral investment treaties (BITs) and multilateral mega-regional agreements, further has palpable effects on workers and the terms on which they work, with investors

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25 See ns 17 and 18 above.
26 See n.17 at 8. Curiously, by way of contrast this ‘driver’ is entirely omitted from the *Synthesis* report, which does deal with some of the issues but under different heads, e.g. ‘migrants’ under demographics only. See n.18 at 4.
27 See n.1 at 6, para. 29. See also n.17 at 9.
prepared to ‘adopt more short term and risky strategies’. To this I would add the established ways in which investor State dispute settlement (ISDS) currently leads States to be reluctant to improve labour standards, so as to avoid allegations of indirect expropriation and breach of legitimate expectations. As this now affects EU trade, there is finally pressure for reform coming from Europe.

B. Demographics

The point made regarding demographics is more straightforward, especially in Europe, where there is an undeniably aging population, with the prospect of fewer younger workers left to support those in their old age. Although, ironically, those struggling to find work at present are the young, not the middle aged (who will need their input into the economy when they retire in the next twenty years or so). Issues of inequalities in access to the labour market for the young, women and those with disabilities arise here. Also at issue are the ways in which migration could mitigate problems for wealthier countries with an older demographic, such as many European States. (Notably powerful anti-immigrant trends in Europe at present might lead to outright rejection of what would be a helpful solution). Overall, the increase in global population trends (a 40 million increase in the labour market each year) means the world economy has to create what Ryder estimates are 600 million new jobs.

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29 See n. 17 at 8 – 9.
33 See n.1 at 5.
C. Technology

More significant yet may be the replacement of human labour with technological advancement in the fields of robotics and artificial intelligence (AI). Arguably, the former is more a threat to ‘unskilled’ labour, while the latter challenges the analytical roles offered currently by ‘skilled’ labour. These innovations may boost productivity and profitability, but pose an obvious challenge to the achievement of the ILO’s (and Europe’s) longstanding objective of ‘full employment’. Just at a time when more jobs need to be created, new technologies seem likely to lead to their reduction, although the predictions on this front remain uncertain, with more job losses currently anticipated in the developing countries rather than in Europe.\(^{35}\) In this context, claims have been made regarding the need for redistribution of the profits made via such methods. There is also a debate regarding how people can be secured a meaningful income in the absence of work, leading to proposals for a universal basic income.\(^{36}\)

D. Climate change and environmental sustainability

The last driver listed in the Inception report was ‘climate change’,\(^{37}\) while the Synthesis report (thankfully) added in the broader issue of environmental sustainability.\(^{38}\) The difficulty is the often negative correlation between creation of jobs and environmental pollution: ‘the remarkable reduction of working poverty in many countries was accompanied by an increasingly intense use of natural resources or an increase in the ecological footprint’.\(^{39}\) The current situation is clearly not viable, but requires ‘just transition’ from unsustainable forms of work to more durable modes of production and service delivery.\(^{40}\)

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\(^{35}\) The Inception Report n.17 at 25 lists different projections which vary from a risk to over 56% of jobs (in ASEAN coming from an ILO study) to 2/3 of all jobs in developing countries. Estimates are more conservative from Pricewaterhouse Coopers regarding jobs in the UK and Germany (30% and 35% of jobs respectively to go) and Roland Berger’s view that the loss in industrial jobs will be more than compensated by a rise in jobs in services.

\(^ {36}\) See n. 1 at 12; and n. 17 at 10 and 21 and 23.

\(^ {37}\) See n.17 at 12.

\(^ {38}\) See n.18 at 5.

\(^ {39}\) See n. 17 at 12.

\(^ {40}\) See n.17 at 13.
Each of these items seems to stem from ‘external’ pressures, just requiring acknowledgment and a suitable response in terms of labour regulation. Yet, this belies the fact that each driver has links to the operation of European capital, product and labour markets to date. For example, environmental pollution (and resultant endangerment of biodiversity as well as other problems associated with climate change) stems from the emergence of capitalism and mass industrialisation exported to other countries. A primary profit motive embedded in responsiveness to shareholder value does not incentivise correction of pollutants or even health and safety effects on workers.\footnote{Sjåfjell, Beate, et al. ‘Shareholder primacy: the main barrier to sustainable companies’ (2015) available on SSRN at: \url{https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664544}.}

Connections can also be made between further technological innovation and the internal logic of capitalism, such that employers seek to make the cost of labour progressively cheaper until it is almost extinguished, without thought to the need for income or other aspects of the welfare of people. Further, patterns of migration can be linked to histories of colonialism and control of other nations, while today ex-colonies and now more broadly developing countries serve as mass production grounds with a cheap workforce. Such States also simultaneously provide markets for European services. The systematic impoverishment of other nations through various trade arrangements, such as the EU Economic Partnership Agreements (EPAs) which emerged after the millennium, arguably create poverty in which democracy and human flourishing are less probable.\footnote{Clair Gammage, ‘Protecting Human Rights in the Context of Free Trade? The Case of the SADC Group Economic Partnership Agreement’ (2014) 20(6) \textit{European Law Journal} 779.} The most extreme forms of exploitation of migrant workers, such as trafficking and modern slavery, can also be linked to poverty engendered in this fashion. This situation helps us to understand the desperation of many to escape their current situation and thereby the ease with which they can be exploited for purposes of, for example, domestic work, sex work and even organ extraction.\footnote{Judy Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38(3) \textit{Oxford Journal of Legal Studies} 557.}

Accordingly, Europe is in an interesting position, for it cannot as a continent regard itself as merely an innocent political actor at the mercy of external forces. Its more economically and militarily powerful States have played a considerable contributing role to the current drivers for change, as has the reach of its capital in the form of multinational corporate activity. Capital mobility, trade exploitation and supply chain management have been exported from
Europe since the days of the Dutch East India Trading Company\textsuperscript{44} and the slave trade,\textsuperscript{45} having its current manifestations in various corporate scandals, including that of Shell in Nigeria.\textsuperscript{46} In this sense, although in this paper I am supposed to be addressing the ‘future of labour law’, it is necessary to recognise Europe’s \textit{past} and its effects. Arguably, the effects of that past cannot just be remedied by labour law means, but also require attention to the global rules governing terms of trade, migration and investment.

It is perhaps interesting that only recently have Europe and Europeans become more aware of how deeply they are entrenched in broader global trading and lending rules, which they helped to establish. This has arguably been the legacy of the financial crisis. From 2010 onwards what has become known as the Troika (consisting of the European Central Bank for the EU, the EU - or ‘European’ Commission and the International Monetary Fund) provided bailouts and other financial assistance for struggling EU States. The conditions for such lending were set out in Memoranda of Understanding (MoU), which demanded reforms to European labour market regulation that had stark effects in terms of access to work (and employment status), job security and collective bargaining.\textsuperscript{47} These measures coincided with the European Commission’s ‘Regulatory Fitness and Performance’ (REFIT) legislative amendment programme at EU level, which led to further deregulation.\textsuperscript{48} While the EU has

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\item \textsuperscript{44} Filippo Carlo Wezel and Martin Ruef, ‘Bureaucratic Innovation and the Control of Labor In the Dutch East India Company, 1700-1796’ in (2016) 1 \textit{Academy of Management Proceedings} 15558 available at: \url{https://journals.aom.org/doi/abs/10.5465/ambpp.2016.15558abstract}.
\item \textsuperscript{45} Martin Klein and Jan Hogendorn, \textit{The Atlantic Slave Trade: effects on economies, societies and peoples in Africa, the Americas, and Europe} (Duke University Press, 1992); Kenneth Morgan, ‘Merchant networks, the guarantee system and the British slave trade to Jamaica in the 1790s’ (2016) 37(2) \textit{Slavery & Abolition} 334.
\item \textsuperscript{48} Isabelle Schömann ,EU REFIT machinery ‘cutting red tape’ at the cost of the acquis communautaire (2015) ETUI Policy Brief 02/2015 \url{<https://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/EU-REFIT-machinery-cutting-red-tape-at-the-cost-of-the-acquis-communautaire>}.\end{itemize}
been promoting core labour standards abroad, for example through its Generalized System of Preferences (GSP+), it has not done so internally, regardless of its claims to promote ‘Policy Coherence’, which we shall revisit later in this paper. In my view, a lack of EU internal commitment to basic labour standards such as freedom of association and the effective collective bargaining casts in doubt the integrity of the demand that other States meet these commitments.


Of course, the ‘future of work’ project is just one amongst many centenary initiatives being pursued by ILO. But ‘what gives it particular significance, and perhaps explains the great interest it has evoked, is that it is launched in a context of great uncertainty and insecurity, and of fear that the direction of change in the world of work is away from, not towards, the achievement of social justice’. In the wake of the financial and sovereign debt crises in Europe, this determination to remedy injustice in the labour sphere has considerable resonance. Indeed, we might see the adoption of a new EU initiative taken in November 2017, the European Pillar of Social Rights for the Eurozone (that is, the EU States which have adopted the Euro as their currency), as the main European response to such concerns. Although, to sound a note of caution, the Social Pillar has been viewed by some commentators as a means for the EU to further additional economic objectives by presenting

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50 See text accompanying n. 9 below.


52 The others being: the governance initiative; the standards initiative; the green initiative; the enterprises initiative; the end to poverty initiative; the women at work initiative. Arguably, each of these also link to issues regarding the future of labour law. See n.1 at 1.

53 Ibid., 2 at para. 9.

these in a socially aspirational fashion.\textsuperscript{55} Notably, this is intended for the group of States which have experienced the most stringent financial conditionality and interventions from the EU in an effort to keep their common currency, the Euro, afloat. Yet, as we shall see, the Social Pillar does not do much (at least as yet) to address the tangible drivers for reform identified by the ILO (discussed in section 2). Instead, the Pillar states broad principles according to which the EU (or a coalition of willing Eurozone States within the EU) might orient its social policy. More promising, perhaps, has not so much been the adoption of legal reforms (although there have been some recent significant changes regarding the worst forms of exploitation such as human trafficking), but rather the drift of litigation. We are seeing cases at the European level (for example before the European Committee of Social Rights under the ESC) and at national level starting to address new changes in the labour market in ways which offer support and protection for those engaged in new emergent forms of work.

The ILO has offered a typology of avenues to justice under four headings, which might combat the drivers doing such damage. I shall suggest each of these is recognised in European spheres, albeit in different ways with varying degrees of success. Indeed, a flavour of a distinctive ‘European’ perspective comes across in the ILO Synthesis report, which summarises national dialogues and some regional (for example the Nordic) dialogues. I will be supplementing this narrative with a selection of European regional and national level developments, which could also be seen as offering new futures for labour law.

A. ‘work and society’

Ryder in 2015 offered a vision of work’s place in society that recognised many of the social goods which can come from having a job: not just subsistence but also ‘self-realization, imbued with the notion of personal collective purpose’\textsuperscript{56} Arguably, although not specifically acknowledged, Ryder’s vision has been shaped by the ‘capabilities’ theory advocated by Amartya Sen, with its emphasis on human functionings and ability to make meaningful choices as to how these are to be exercised.\textsuperscript{57} Ryder acknowledged that poor working conditions will also have their costs, but explained that the benefits which can be derived

\textsuperscript{55} Klaus Lörcher and Isabelle Schömann, The European Pillar of Social Rights: Critical legal analysis and proposals (ETUI, Report 139, 2016).

\textsuperscript{56} Above n.1 at 10.

\textsuperscript{57} Amartya Sen, Development as Freedom, (Oxford University Press, 1999).
from work are placed under threat where there is widespread unemployment, whether caused by the kind of demographic shifts we are seeing in Europe, or structural threats to jobs (and the security of jobs) posed by robotics and AI. This idea was taken further in chapter 2 of the Inception report by acknowledging current threats to job security with the rise of precarious and often ‘invisible’ care and platform work. Such developments are said to threaten safety and health, but also present ‘psychosocial risks’, such as work-related stress.\(^{58}\) Balancing work and family raises equality issues regarding participation in the labour market, but these arguably arise more fully in relation to the ‘decent jobs’ heading where Ryder has stressed the significance of structural factors in the labour market operating to disadvantage young people, women and the disabled.\(^{59}\) Underlying all of this are concerns with effective social protection (long a crucial part of the Decent Work Agenda and recognised in the ILO Social Protection Floors Recommendation 2012 (No. 212)). Alongside these developments, the Inception report raised the potential adoption of a ‘universal basic income’ (UBI), which curiously was apparently viewed relatively uncritically as having the potential to ‘act as a deterrent against poor quality jobs’\(^{60}\). There does not seem to be sufficient critical attention paid to the potential vulnerability of those who are permanently dependent on the State. They are unlikely to be able to insist on better quality jobs if a State unsympathetic to their plight pays them only at such a bare subsistence level that they will still take any work. There are also dangers that those who become dependent on the UBI will be exposed to economic fluctuations reflected in the tax base. They may also lack forms of agency usually associated with paid work such as union membership and communal voice, unless provision is made to ensure this.\(^{61}\)

The first point to note in response to the ILO views of ‘work and society’ is that different European countries are experiencing different demographic and structural changes in their labour markets. While large scale youth unemployment is a serious issue for Greece (currently 43.2%); and structural youth unemployment is a problem for France, Italy, Portugal and Spain (ranging between 24 and 33%),\(^{62}\) this is not the case for the UK. The UK

\(^{58}\) See n.17 above at 19.
\(^{59}\) See n. 1 above at 13, para. 60.
\(^{60}\) See n.17 above at 21.
has one of the lowest rates of unemployment in its history (sitting at 4%),\(^{63}\) with youth unemployment at 11%,\(^{64}\) but this is because the labour market offers (and labour laws enable) extensive precarious and low paid work (which counts as ‘employment’ for statistical purposes). The majority of those in poverty in the UK are also in work. Further, those surveyed complain of being under-employed, not able to rely on provision of full time work and thereby a sufficient wage to support themselves or dependents.\(^{65}\) Work-related stress in the UK is (perhaps unsurprisingly) estimated to be at an all-time high.\(^{66}\) The same problem does not arise in other European States, such as Denmark, Finland, Norway and Sweden (hereafter the Nordic countries). These countries have experienced overall unemployment rates of between 4-7% and youth unemployment of 11-15%, yet the jobs on offer provide more than a living wage with relatively little inequality (apparently due to more effective collective bargaining systems than are found elsewhere in Europe).\(^{67}\)

Protections are provided by EU law for workers in the event of collective redundancy, insolvency or the transfer of an undertaking, but their limitations should also be noted.\(^{68}\) For example, introduction of new technology could constitute a ‘sufficient economic, technical or organisational’ reason to justify a dismissal or changes in terms and conditions associated with transfer of an undertaking.\(^{69}\) Further, the information and consultation requirements preceding collective dismissal are unlikely to persuade an employer to deviate from a course (once chosen) of utilisation of robotic or AI technology. These may slow the process of change down and require a response from the employer, but ultimately do not challenge managerial prerogative. The Court of Justice of the European Union (CJEU) has also,


\(^{64}\) [https://tradingeconomics.com/united-kingdom/youth-unemployment-rate](https://tradingeconomics.com/united-kingdom/youth-unemployment-rate).

\(^{65}\) Following independent reports from the Joseph Rowntree Foundation, a charitable trust which sponsors poverty-related research: the finding that a majority of those in poverty are in a working household comes from information made available in 2015/16 at: [https://www.jrf.org.uk/data/workers-poverty](https://www.jrf.org.uk/data/workers-poverty); now this figure is estimated to be closer to two thirds: [https://www.jrf.org.uk/press/working-families-still-locked-poverty-time-right-wrong-work-poverty](https://www.jrf.org.uk/press/working-families-still-locked-poverty-time-right-wrong-work-poverty).


\(^{69}\) See Article 4 of Directive 2001/23.
arguably in line with the limitations of the EU directives, been conservative in its application of the EU Charter of Fundamental Rights to protect workers’ rights in cases of collective redundancy and transfer. For example, in the AMS case,\(^{70}\) Article 27 of the EU Charter of Fundamental Rights could not be given direct effect in a claim brought by an individual.\(^{71}\) In the Alemo-Herron,\(^{72}\) it was found that dynamic clauses continuing coverage by a collective agreement after a transfer of undertaking could not be enforced, as this would unduly impinge upon an employer’s ‘freedom to conduct a business’ under Article 16 of the Charter. The EU or Member State governments may need to do more than this if they wish seriously to encourage employers to protect jobs under threat from robotics and AI initiatives.

As regards social security law, the EU provides overarching protection of non-discrimination in access to benefits,\(^{73}\) as well as a framework designed to ensure that workers moving between Member States are not subjected to any form of systematic disadvantage.\(^{74}\) The EU does not provide (at present) any overarching requirement that social security benefits be set at any particular level. Instead, this is done in the Council of Europe through a European Code of Social Security, which sets out the desired types of benefit, alongside suitable proportions of contribution and payment provision. This is not binding on all Council of Europe Member States, but has consequences for a significant number depending on what instrument they have signed and ratified, subject to any declarations or reservations. The UK, for example, did ratify the initial Code and lodged declarations limiting its obligations thereunder, but (like many Council of Europe Member States) has not ratified (or even signed) the new Revised Code.\(^{75}\) Initially, the European Code of Social Security did not seem to significantly obstruct States seeking to implement austerity measures in the wake of the financial crisis. However, in one important instance, the Code offered a basis for resistance in the Council of Europe’s European Committee of Social Rights (ECSC), which reached the conclusion that Greece was in breach of Article 12 of the European Social Charter by virtue of that State’s deliberately and determinedly regressive measures concerning retraction of

\(^{70}\) Case C-176/12 Association de Mediation Sociale (AMS) v CGT [2014] ECR I000.

\(^{71}\) Although an action against the Member State on Francovich principles might be permissible. See Case C-479/93 Francovich v Italy [1991] ECR I-5357.

\(^{72}\) Case C-426/11 Alemo-Herron and others v Parkwood Leisure Ltd [2013] IRLR 744.

\(^{73}\) See for example Directive 2000/43, Art.3(e) and Directive 2006/54, Art. 5.

\(^{74}\) See Article 45 TFEU and Council Regulation (EC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.

\(^{75}\) See https://www.coe.int/en/web/turin-european-social-charter/treaties1.
pension provisions. This was not an acceptable measure in the consequence of measures taken to remedy Greece’s sovereign debt crisis.\textsuperscript{76}

The EU has yet to endorse in principle provision of a ‘universal basic income’ (UBI). Nevertheless, the new EU Pillar of Social Rights offers perhaps a helpful normative base for more concentration on social security than has been the custom to date. Of particular interest may be principle 14 on ‘minimum income’ which states that:

Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.\textsuperscript{77}

This statement does not necessitate any legislative action in the EU, but may arguably lead to (and guide) further policy experimentation in Eurozone States.\textsuperscript{78}

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\textsuperscript{76} See finding of breach of Article 12(3) in \textit{Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece} Complaint Nos. 76-80/2012 culminating in Resolution Res ChS (2014) 10 on 2 July 2014 available at: \url{http://www.europeanrights.eu/public/atti/Resolution_CM_7_ING.pdf} at para. 69: ‘even when reasons pertaining to the economic situation of a state party make it impossible for a state to maintain their social security system at the level that it had previously attained, it is necessary by virtue of the requirements of Article 12§3 for that state party to maintain the social security system on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security. This requirement stems from the commitment of state parties to ‘endeavour to raise progressively the system of social security to a higher level’ which is expressly set out in the text of Article 12§3, and is distinct from the requirement set out in the last part of Article 12§2 to maintain the social security system at a satisfactory level at least equal to that required for ratification of the European Code of Social Security...’. See also Margot Salomon, ‘Of Austerity, Human Rights and International Institutions’ (2015) 21(4) \textit{European Law Journal} 521.


\textsuperscript{78} See the statement at: \url{https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en} to the effect that: ‘Delivering on the principles and rights defined under the European Pillar of Social Rights is a joint responsibility of the European Union institutions, Member States, social partners and other stakeholders. The European institutions will help set the framework and give direction on the way forward for implementation of the Pillar through legislation where needed, in full respect of Member States’ competences and taking into account the diversity of their situations.’
In January 2018, the Council of Europe Assembly voted in favour of a Resolution concerning universal basic income (UBI) as a right of citizens. 52% voted in favour of the policy, while 36% voted against it and 13% abstained.\(^79\) That decision was taken on the basis of a report delivered by the Assembly Committee on Social Affairs, Health and Sustainability. This does not amount to commitment from the Member States in the Council of Europe’s chief executive body, the Committee of Ministers, but remains a significant development in terms of policy direction.

In the ILO Synthesis report, it was noted that Germany raised the issue of basic income as part of what might make ‘the benefits provided by the welfare state … fit for the future’.\(^80\) But, so far, the one European State to have adopted the UBI (on a trial basis) is Finland (a member of both the EU and Council of Europe). This was a two year experiment which commenced in 2017, although it now seems likely to be discontinued. Similar experiments are being carried out at city levels in the Netherlands (so far Utrecht, Tilburg, Nijmegen, Wageningen and Groningen).\(^81\) In the UK, the Scottish Government is planning to experiment with the UBI, but (at the time of writing) the details have yet to be determined, except for identification of the four localities to be trialled.\(^82\) The message here is one of trial of UBI rather than full commitment to this strategy as a viable solution to a diminution of work in Europe; further, as noted above, it is by no means viewed as inevitable that work will be in decline.\(^83\)

**B. ‘decent jobs for all’**

Ryder in his 2015 Report was concerned, not only with securing a reasonable quantity of jobs but jobs of sufficient ‘quality’.\(^84\) There was potentially a need to examine ‘innovative ways of distributing available work and of compensating it’.\(^85\) Here his eye seemed to be on the care

\(^79\) [https://basicincome.org/news/2018/02/europe-council-europe-adopts-resolution-basic-income/](https://basicincome.org/news/2018/02/europe-council-europe-adopts-resolution-basic-income/).

\(^80\) See n.18, 7.

\(^81\) [https://www.ft.com/content/3b7938e6-c569-11e7-b30e-a7c1c7c13aab](https://www.ft.com/content/3b7938e6-c569-11e7-b30e-a7c1c7c13aab); [http://time.com/5252049/finland-to-end-universal-basic-income/](http://time.com/5252049/finland-to-end-universal-basic-income/).


\(^83\) See n.35 above.

\(^84\) See n.1 at 11, para. 53.

\(^85\) Ibid., at 12, para. 55.
economy, the green economy and also ‘the unfurling technological revolution’. This would mean attention to access to skills and training, especially in the knowledge economy, as well as a broader macroeconomic agenda. He added that this ‘situation is illustrative of the wider need for targeted policies that respond to the needs of groups whose disadvantaged position in labour markets is so universal and so marked that it can only be the result of deep-seated structural factors…’ In Chapter 3, the Inception report seemed to struggle to distinguish this head from that of ‘work and society’, raising issues again relating to technology and job quantity, inequality and job quality as well as adjustment costs for individuals, which overlap with the concerns regarding availability of jobs and social security. Similarly, the Synthesis report identified issues relating to the changing role of women in society both in relation in ‘work and society’ as well as ‘decent jobs for all’ (as a cohort in the national dialogue). It seems these cannot be neatly distinguished.

The EU tackles barriers to access decent jobs primarily in two ways: first, through the promulgation of anti-discrimination law and, secondly, through a ‘European Employment Strategy’ which through the innovative design of an ‘open method of coordination’ seeks to promote greater labour market inclusion. The Council of Europe addresses the most extreme violations of human rights at work, namely what we could describe as ‘indecent’ work.

i. EU equality law

EU equality law makes provision for the prevention of discrimination on grounds of sex and (since 2000) also sexual orientation, race, disability, religion, belief and age. However, these formal legal processes do not always secure effective access to work (or protection from dismissal), as has been observed in relation to women, but also more recently in the context of religious discrimination and a ban on the veil in the workplace. Most cases relating to

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86 Ibid., at 12, paras 55-57.
87 Ibid., at 13, para. 60.
88 See n.17 at 23-28.
89 See n. 18, Conversations 2 and 3 at 19 – 50.
age concern discrimination against older rather than younger workers (for example, see the extensive litigation regarding the retirement age), no doubt because those who are older tend to have more resources to bring claims. Further, the ability to justify even direct discrimination on grounds of age when it is a proportionate means of achieving a legitimate aim means that it is difficult to bring successful cases.\textsuperscript{92}

It is notable that the new European Pillar of Social Rights has as its first of three chapters, ‘Chapter I: Equal opportunities and access to the labour market’. The principles in this chapter include gender and equal opportunities, as well as education and life-long learning.\textsuperscript{93} These are clearly the issues to which Ryder points but, once again, it is unclear the extent to which there will be action by the EU and its institutions or Member States (or the social partners, namely management and labour) in response to its normative statements.

\textit{ii. The EU European Employment Strategy}

Second, through an ‘open method of coordination’, an EU ‘European Employment Strategy’ process\textsuperscript{94} has encouraged Member States to reflect on their policies, offering examples of best practice but also any failed policy experiments offering their ‘national reform programmes’. These have been scrutinised by the European Commission, which exercises a kind of facilitative supervisory role offering ‘country specific recommendations’, and with the EU Member States in Council, also offers the re-shaping of ‘guidelines’ for each annual iteration of the process.\textsuperscript{95} Such policies feed into the ‘flexicurity’\textsuperscript{96} and active labour market policies of particular States as they then decide their own national action plan going forward. The aim is to combine sovereign autonomy of States with the crafting of common objectives. In this

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\textsuperscript{93} See n.77 above.

\textsuperscript{94} Art 145-150 TFEU. See for a history and critical discussion of this process, Diamond Ashiagbor, \textit{The European Employment Strategy: Labour Market Regulation and New Governance} (Oxford University Press, 2005).

\textsuperscript{95} For background and critical analysis from the European Parliament, see http://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf.

\textsuperscript{96} Ton Wilthagen and Frank Tros, ‘The concept of ‘flexicurity’: a new approach to regulating employment and labour markets’ (2004) 10(2) European Review of Labour and Research 166; see also reference to ‘flexicurity’ by Ryder at n.1, 14.
way, States are prompted to consider in other ‘open method of coordination’ (OMC) processes flexibility in the labour market alongside forms of social protection and access to vocational skills training. The aim is that the State takes some of the burden of job insecurity providing not ‘job’ but instead ‘employment’ security. It should be clear, however, from the statistics provided above (comparing Nordic countries, Mediterranean States and the UK) that this process has varying degrees of success in the actual Member States concerned.

iii. Human rights protections from the Council of Europe

EU technical legal requirements regarding discrimination are supplemented by the operation of the Council of Europe’s ECHR, which also protects, for example, under Article 9 protection of religion and belief and under Article 10 freedom of expression in the workplace, alongside a subsidiary requirement of non-discrimination under Article 14. These provisions have also been the subject of litigation. Again, it can be difficult to gain protection against religious discrimination, for example on the basis of display of religious symbols, due to the provision made in the ECHR for proportionate exceptions to these human rights protections on listed legitimate grounds, alongside a margin of appreciation given by the European Court of Human Rights to Member States.

Where there has arguably been some notable success is in the field of slavery and forced labour by virtue of Article 4 of the ECHR. In 2005, The Council of Europe adopted the European Convention Against Trafficking in Human Beings (very much in response to the UN Palermo Protocol to Prevent Supress and Punish Trafficking in Persons, Especially Women and Children). Swiftly, on the heels of this commitment, the European Court of Human Rights heard one of the first key cases on domestic forced labour (under Article 4 rather than the Convention Against Trafficking), being an illustration of the worst form of exploitation of child migrant labour in the care industry. This was the case of *Siliadin v*

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97 Litigation before the European Court of Human Rights in *Eweida v UK* [2013] ECHR 37 was successful, but possibly because the employer (British Airways) had by the time of hearing reinstated the employee and was revisiting its dress code policy; the joined case of *Chaplin v UK* was unsuccessful on the basis that wearing a cross in a hospital could have health risks. The Court has been systematically unsympathetic in the ‘veil’/burqa cases as discussed in Raffaela Nigro, ‘The margin of appreciation doctrine and the case-law of the European Court of Human Rights on the Islamic veil’ (2010) 11(4) Human Rights Review 531.
France,\(^98\) in which it was made clear Member States in the Council of Europe are obliged to take positive measures to prevent forced labour, even when initiated by private persons, and to penalise such conduct. This normative push led to adoption of the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims. The spotlight was later turned on the UK in the case of *CN v United Kingdom*,\(^99\) which concerned a Ugandan national working as live-in carer. She had been supplied with a false passport and warned she was at risk of arrest and then loaned out to work for elderly couple as carer, being permanently on call with two hours off on Sundays and was not paid. The European Court of Human Rights looked at UK law at time with reference to Article 4 interpreted in the light of ILO Forced Labour Conventions (and Indicators of Forced Labour) and found the UK to be in breach of its obligations to provide adequate protection of victims of this nature. This judgment was arguably one of the chief prompts that led to the adoption of the Modern Slavery Act 2015 in the UK (and ratification by the UK of the Forced Labour Convention Protocol in 2014). In this way, the European Court of Human Rights could be said to address the most egregious issues in the ‘care’ sector (to which Ryder refers). It is however still to be doubted whether the Modern Slavery Act 2015, which Theresa May holds out as an exemplar of best practice, actually satisfied the concerns of the Court, given its focus on criminal sanctions rather than protections of victims.\(^100\)

C. ‘organization of work and production’

Concerns regarding the ‘digital economy’ and its regulation have been raised across the four headings offered initially in 2015 by Ryder. In part, this is because, as the *Synthesis* report identified (in relation to ‘work and society’), the knowledge society creates ‘digital divides’, such that some countries and members of society benefit exponentially, while others form part of a growing precarious ‘digital underclass’. The increasing porousness of the boundary between work and home, fostered by mobile technology issues and social media impacts on privacy and intimacy, and can also lead to forms of work-related (or psycho-social) stress.\(^101\)

\(^98\) (2006) 43 EHRR 16.
\(^101\) Acknowledged again in the *Synthesis* report n.18 at 17-18.
This issue also relates to the availability of ‘decent jobs’, as those on the margins of the labour market, such as women struggling to manage work and care responsibilities, or young persons and workers with disability struggling otherwise to gain access to the labour market. In this way, the concerns regarding structural discrimination raised in the previous section are relevant here too.102 These workers may find themselves more easily hired in precarious ‘gig’ work.103 Such work has come to be associated with ‘on call’ hire and ‘zero hours contracts’ and pay below national statutory minima or that set by collective agreements.104 Although ‘gig’ work is estimated by the ILO to be only 0.5% of work internationally at present,105 there are now higher estimates of its prevalence in Europe and the trend is predicted to increase.106

Hired through digital platforms, those doing the hiring too often seek to place these (most vulnerable) workers outside the sphere of standard employment laws by denying them ‘employee’ and/or ‘worker’ status.107 In the UK, these are two different forms of status to which different statutory and common law entitlements attach (see the Employment Rights Act 1996, section 230); notably statutory protection from dismissal applies only to ‘employees’. Under EU law a single status of ‘worker’ at least notionally applies across different legal spheres, such as free movement and discrimination law. Yet, it has been suggested by Nicola Kountouris that it may be time to contemplate change to this single ‘worker’ status in response to the challenges currently posed across Europe regarding precarious ‘gig’ working.108 Kountouris suggests that this issue may be revisited as an action under the European Pillar of Social Rights. He speculates that one possibility for change is a planned revision of the Directive on the Written Statement of Terms and Conditions of Employment.

102 See n.18 above, at 11.
103 See the Inception report, chapter 3, at 24-25.
104 Ibid., at 32-33.
105 Ibid. at 34.
106 Early results from a study conducted by the University of Hertfordshire for the Foundation for European Progressive Studies are that: ‘A high proportion of the population (ranging from 9% in Germany and the UK to a high of 22% in Italy) reported having done some crowd work.’ They also found that ‘gig’ work was combined with other sorts of work so that the boundaries between working practices have become blurred. See https://www.herts.ac.uk/about-us/news/2017/november/working-in-the-european-gig-economy.
107 The practice is now notorious. See the overview provided by the International Bar Association which is interesting because it includes interviews with practitioners in the field: https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=cba4c174-2a35-4e5f-a278-9255c1e2577e.
Employment 91/533/EEC. This would be a backdoor route to addressing the definition of EU worker status, given continued refusal of the EU Commission and Council to address the issue directly. However, as he notes, this is the proposal being made currently by the European Parliament.¹⁰⁹

In practice, it may not be a legislative initiative at EU level, but rather litigation (with all its flexibility in response to contemporary challenges) which is more influential. For example, in 2017, the Court of Justice of the EU ruled that ‘Uber’, the platform based service whereby drivers supply their cars and labour,¹¹⁰ could not be regarded as an ‘intermediation’ service, but was a ‘transport’ service, which could be regulated as such in accordance with EU Regulations and Directives.¹¹¹ While this was not a case regarding employment status, that litigation is arising ad hoc in EU Member States.

Recent cases in Italy and Spain indicate those working in the gig economy should be regulated by transport rules and should have employment status which makes them eligible for legislative protection.¹¹² Indeed, this has also been the line taken in the UK courts, which despite one brief aberration, have uniformly found Uber drivers and other types of couriers hired through platform apps to be workers entitled to the national minimum wage, paid annual leave and other working time protections.¹¹³ The aberration arose where ‘Deliveroo’ food couriers were found not to be workers for the purpose of statutory trade union

¹¹⁰ For Uber’s place in the ‘gig’ economy and how common this form of platform-based hiring is becoming, see Jeremias Prassl, Humans as a Service: The Promise and Perils of Work in the Gig Economy (OUP, 2018).
¹¹¹ See Case C-434/15 Uber Systems Spain v Asociación Profesional Elite Taxi http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130dc0b86fcc557a449cba761dc96afe9f64ce34KaxiLe3eQc40LaxqMbN4Pbh0Ne0?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&qcid=115775.
¹¹² See again for a practitioners’ summary: https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=eba4e174-2a35-4e5f-a278-9255c1e2577e.
recognition procedures. This finding was due to the employer’s unilateral variation of their contracts to insert ‘substitution’ clauses, so that they were deemed not to provided personal service, which is a crucial aspect of eligibility as a ‘worker’ in the UK. The outcome in the ‘Deliveroo’ case has been cast into doubt by a judgment of the UK Supreme Court in *Pimlico Plumbers*, which indicated that a mere substitution clause even if used from time to time will not be sufficient to eliminate employment status. What matters is ‘whether the dominant feature of the contract remained personal performance’ enabling, where this was indeed the case, access to protection under EU and UK equality law.

In the UK, the current Conservative Government is pushing for legislative reform and commissioned a so-called ‘Independent Review’ (the ‘Taylor Review’) to make suggestions accordingly, but it is not yet clear what statutory action will be taken, if any. The difficulties of establishing a straightforward statutory test for employment status that would tackle gig economy issues mean that many academics are sceptical of this path of action, especially when initiated by a Conservative Government. We suspect that the incremental approach of the courts is more likely to do justice to those in ‘gig’ economy work.

**D. ‘governance of work’**

As observed in 2015 by Ryder contemporary patterns of production and supply of services, using supply and global value chains, pose challenges for the governance of work. As the *Inception* report also observed, ‘the structure of contemporary enterprises differs vastly from the vertically integrated, nationally based and focused firms of an earlier era of capitalism’. This raises questions as to whether labour standards can viably be set nationally, or whether

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116 Ibid., per Lord Wilson, para. 32.


119 See n.1, ch 3.

120 See n.17 at 29.
international coordination in their setting and application is more important than it was. There are calls for ‘lighter’ regulation, which gained considerable traction in the austerity measures adopted in the context of the European sovereign debt crisis. Corporate social responsibility has also been viewed as a potential alternative means of private governance, as opposed to public governance.\footnote{See n.17 above, 41.} However, this has the effect of elevating the power of commercial (corporate) institutions. As the \textit{Inception} report noted:

International trade and increased globalization, including through supply chains, have combined to create space for single actors to exercise significant power over work in multiple and often distant jurisdictions.\footnote{See n.17 above, 38.}

That report considered the scope for response from employer and worker organisations in the context of declining membership density and collective bargaining coverage, with however the helpful reminder that ‘trade unions remain the largest membership-based organizations worldwide’.\footnote{Ibid., 38-9.} Attention was paid to the decline in sectoral bargaining, but also the future of social dialogue and tripartism.\footnote{Ibid., 39 – 45.}

What was troubling for me as a labour law scholar when reading Ryder’s 2015 report was his treatment of the right to strike. He acknowledged that recent controversy in the ILO, but claimed that it had ‘revealed the very firm support of governments, employers and workers for the ILO’s key international standards-based global governance function’.\footnote{See n.1 at 16, para. 78.} There was no further mention of the right to strike in his report, not even in relation to issues of ‘social dialogue’. Experimentation with new emerging forms of unionism, including migrant and informal workers was featured in the \textit{Inception} report, but again did not mention the subject of their access to industrial action (which has been a live issue in the UK thanks to the protests initiated by new community unions, such as the Independent Workers Union of Great Britain).\footnote{See \url{http://www.solfed.org.uk/catalyst/london-cleaners-strike-and-win}; and \url{https://www.theguardian.com/commentisfree/2017/may/25/lse-striking-cleaners-outsourced-university-injustice}.} Instead, the \textit{Inception} report said that the ‘question may be one of accommodating “voice” within reflexive governance processes that require collaborations between different interest groups yet continue to recognize the representative legitimacy of
membership-based interest groups’. This is a very collaborative and non-confrontational picture and arguably cedes far too much ground to employer interests.

From a ‘European perspective’, national level collective labour laws which promote the right to strike and collective labour law have come under threat from a dual-pronged attack, namely the operation of the EU single market and the imposition of austerity measures. Where Europe has been innovative is in its ‘works councils’ model, which have shaped the objectives of European companies, making them more prone to not just unilaterally adopting corporate codes of conduct, but also engaging in transnational collective bargaining. The outcome has been international (or now more commonly called ‘global’) framework agreements concluded with Global Union Federations. The Council of Europe’s European Court of Human Rights has been innovative in recognising that collective bargaining and the right to strike fall within protection of freedom of association under Article 11 of the ECHR, but are hesitant to criticise the UK, which is one of the worst culprits for violation of such rights.

i. threats to national collective bargaining and strike laws posed by EU free movement rights

There have been various long-standing barriers to the evolution of EU collective labour law. Freedom of association and the right to strike are excluded from EU competence under Article 153(5) of the Treaty on the Functioning of the European Union (TFEU). This means that regulation of trade unions, collective bargaining and industrial action occurs, not for the benefit of workers under explicitly social policy directives, but as a ‘backdoor’ exception to free movement and competition law rights. The judgments delivered by the EU Court of Justice in the Viking and Laval cases limited access to collective action with reference to employers’ entitlements to freedom of establishment and freedom of services, respectively.

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127 See n.17, 43.
129 Case C-438/05 International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line (‘Viking’) [2007] ECR I-10779; Case C-341/05 Laval un Partneri v Svenska Byggnadsarbetareförbundet (‘Laval’) [2007] ECR I-11767.
In the wake of enlargement of the EU to its current membership of 28 States, the Court of Justice of the EU clearly considered it had become imperative to further promote free movement, despite stark differentials in wages that led to workers from the old EU-15 opposing the movement of establishment to another new MS (Viking) and the influx of ‘posted workers’ from new MS to their own sites of employment (Laval). The outcome of these cases (which led to restrictions on the right to strike) was criticised explicitly in the International Labour Organisation (ILO) by the Committee of Experts on the Application of Conventions and Recommendations (CEACR)\(^{130}\) and implicitly in the Council of Europe (by the European Committee of Social Rights) in relation to Swedish legislation providing for implementation of the case law.\(^{131}\)

The Posting of Workers Directive has now been amended in 2018 to state that it ‘shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action…’\(^{132}\) This does not however create any positive protection for the right to strike. More promising may be the inclusion of principle 8 into the European Pillar of Social Rights (‘Social dialogue and involvement of workers’) which in (a) makes explicit mention of consultation of ‘social partners… on the design and implementation of economic, employment and social policies according to national practices’ and says that social partners ‘shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and right to collective action’.\(^{133}\) However, as observed above, there is no immediate prospect of the EU acting to protect collective action, given that this does not fall within EU legislative competence.

\(\textit{ii. The impact of the EU austerity agenda}\)

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\(^{130}\) ILO CEACR Report on UK compliance with Convention No. 87 (2013).

\(^{131}\) \textit{Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden}, Complaint No. 85/2012, Decision on admissibility and on the merits, 3 July 2013.


\(^{133}\) See n.77 above.
Since the financial crisis, EU institutions have also prompted changes to national collective labour laws by virtue of conditions imposed on lending. These began with ‘austerity’ measures put in place by the Troika in the memoranda of understanding accompanying bailout packages (reinforced by a European Stability Mechanism and the Euro Plus Pact). There were four ‘bail-out programmes’ (Greece, Portugal, Ireland and Cyprus) and four ‘financial assistance programmes’ (Hungary, Latvia, Romani and Spain), but such measures were also prompted by the Europe 2020 Growth Strategy and accompanying Country Specific Recommendations. That strategy has been accompanied by introduction of an ‘Excessive Deficit Procedure’ for all EU States prompting action by any State whose budget deficit exceeds 3% of GDP or whose public debt exceeds 60% of GDP. In these ways, pressure has been placed on EU States to address the ‘rigidities’ of labour markets, such that there have been recommendations to bypass trade union participation in wage-setting and to end national level and sectoral bargaining. Moreover, new forms of flexible and atypical working were introduced, which had the effect of depriving persons of access to individual employment law rights, but also collective representation at the

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139 In respect of this internal devaluation strategy, see Aristea Koukiadaki and Lefteris Kretos, ‘Opening Pandora’s Box: The sovereign debt crisis and labour market regulation in Greece’ (2012) 41 Industrial Law Journal 276, 291–93; also Imre Szabo, ‘Between Polarization and Statism – Effects of the crisis on collective bargaining processes and outcomes in Hungary’ (2013) 19(2) Transfer 205, 211.

workplace. While the EU Charter of Fundamental Rights (such as Article 28) might have been expected to impose limitations on austerity led reform to collective bargaining and industrial relations systems, this was ruled out by the EU Court of Justice which viewed these matters as beyond its competence on the basis that these fiscal measures are not regarded properly as EU law. The fallacies implicit in these decisions have been identified, most notably by Claire Kilpatrick at the European University Institute, but her powerful analysis has yet to lead to any change in approach.

iii. **EU works councils and promotion of transnational framework agreements**

Collective bargaining and workplace representation in Europe arguably had palpable effects on the willingness of European companies to enter into international (now more commonly termed global) framework agreements. The first documented was an agreement between Accor and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) in 1994. This was a significant departure from the adoption of private corporate codes (very much private governance) which tended to neglect core ILO standards. A Code of Practice adopted in 1998 by the International Confederation of Free Trade Unions (ICFTU) [now the International Trade Union Confederation (ITUC)] gave impetus to this practice. ‘International Trade Secretariats’, now known ‘Global Union Federations’ (GUFs), used this resource as a basis to conclude agreements with MNEs. Platzer and Rüb have estimated that of the 113 IFAs concluded by 2012, coverage has been extended to at least 65,000 MNEs with more than 850,000 subsidiaries. These agreements are notable for their inclusion of ILO standards including freedom of association (an issue sometimes dodged in unilaterally adopted corporate codes of conduct), as well as other international recognised human rights and sustainability standards.

142 Case C-370/12, *Pringle v Ireland*, judgment of 27 November 2012.
There are strong links between GFAs and European companies. Currently, only approximately 18% of GFAs involve enterprises based outside Europe. Approximately three-quarters of IFAs and GFAs have been co-signed by European Works Councils (EWC) representatives, as is illustrated by the series of agreements involving Volkswagen. EWCs are also used as a model for World Employee Councils (WECs) or Global Works Councils (GWCs) which can assist in the negotiation of future GFAs, and also assist in the agreements’ implementation. This is likely to be the case where the IFA provides for formal review at every annual meeting of the EWC, such as under the Accor (1995) agreement. Papadakis also points to the way in which the Leoni IFA of 2012, despite its apparent only declaratory status, enabled meetings between management and German works councils which led to assistance for workers in unorganised plants in Romania. However, it should also be noted that the rate of conclusion of IFAs/GFAs has slowed following the financial crisis, suggesting that reforms of collective labour laws in EU Member States may lead to declining bargaining power for the conclusion and implementation of such agreements.

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146 Platzer and Rüb n.144 at 6.
iv. Council of Europe litigation on freedom of association

Since 2008, litigation on Article 11 of the ECHR, which protects freedom of association, has led to recognition that the right to collective bargaining and the right to strike can be derived from this provision. In this way, while the EU has been actively dismantling collective labour laws, the European Court of Human Rights has asserted their significance in human rights terms. The same can be said of the European Committee of Social Rights, which has challenged violations of the European Social Charter relating to collective bargaining and even pensions, whether initiated by EU institutions on the basis of free movement rights or austerity.

However, the limitations of the Article 11 litigation should also be acknowledged. For example, European Court of Human Rights did not intervene to prevent the deregulation of sectoral arrangements in the UK. Instead, in *Unite v United Kingdom*, it was held that the abolition of the Agricultural Wages Board did not constitute an interference with the right to collective bargaining under Article 11. Second, in order for sectoral institutions to operate effectively, it is necessary that trade unions can organize strike action on a sectoral basis. This would require some latitude for trade unions to organize ‘secondary’ industrial action, namely taking action in support of workers hired by a different employer. Under UK law, when calling secondary action, a trade union is exposed to liability in tort and individual strikers to a greater risk of dismissal. However, the UK ban on secondary action was

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151 *Enerji Yapi-Yol Sen v Turkey*, Appn 68959/01, 21 April 2009; also *Hrvatski Lijecnicki Sindikat v Croatia*, Appn 36701/09, judgment of 27 November 2014, para. 59 which describes the strike as ‘the most powerful instrument to protect occupational interests of its members’.

152 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No. 85/2012, Decision on admissibility and on the merits, 3 July 2013.


154 *Unite the Union v United Kingdom* App No 65397/13, 3 May 2016.
considered justified in *RMT v United Kingdom* on grounds of proportionality and the margin of appreciation.\textsuperscript{155}

This has led Ewing and Hendy to observe that there is a hidden exception, Article 11(3), which enables the UK to adopt any labour laws, even if these involve a gross violation of freedom of association.\textsuperscript{156} It may be that the Court’s desire to appease the UK as a State threatening to denounce its obligations under the ECHR (or perhaps even leave the Council of Europe) is undermining human rights standards regarding freedom of association. In this respect, the governance of work from a European human rights perspective looks fragile.

4. Understanding the challenges for European labour law from a ‘sustainability’ perspective

In this part, I shall see to identify potential links between a sustainability agenda and labour standards. I shall then consider the relevance of the SDGs in this context, before considering the extent to which the ‘Policy Coherence’ approach of the EU is likely to promote the outcomes envisaged in the 2030 Agenda. It is suggested that in the absence of strong participatory institutions, as identified by SDG 16 as essential, the future of labour law in Europe looks highly problematic.

A. Links between sustainability and labour standards

The once (considered) discrete economic, environmental and social pillars of sustainability have become recognised as closely intermeshed and interactive. It is not easy to sever the notions of ‘inter-generational justice’ (namely the desire to preserve environmental and other goods for future generations) and ‘intra-generational justice’ (distribution between a single generation). The two can be profoundly connected.\textsuperscript{157} For example, failing to provide

\textsuperscript{155} The National Union of Rail, Maritime and Transport Workers (RMT) v the UK App 31045/10, 8 April 2014; see also Alan Bogg and K.D. Ewing, “The Implications of the RMT Case” (2014) 43 ILJ 221.


\textsuperscript{157} For discussion of the use of these principles in public administration with regard to the environmental and economic contexts, see L.K. Nijaki, ‘Justifying and Juxtaposing Environmental Justice and Sustainability: Towards an Inter-Generational and Intra-
adequate wage income for families (intra-generational justice) can have significant impacts for the next generation (inter-generational justice) when those who were impoverished children are adults unable to engage in productive work or fully participate in society. Instead, it may be more helpful to shift from these problematic tropes to the simple idea of ‘durability’. Without respect for planetary boundaries, the Earth as we know it cannot continue to exist. Labour policies which do not meet the needs of people worldwide will lead to profound social as well as economic and environmental harms now and later. They will not be durable. Rather, such failures interact to generate stress and scarcity that jeopardise prospects for peace and thereby sustenance and maintenance of the planet.

The economic harms which occur when labour is paid an insufficient amount to meet the basic costs of living are obvious. There are not only devastating personal effects on the persons concerned (which impact on human rights to food, water, housing, health and so on), but a lack of spending in the economy, leading ultimately to the destruction of business and banks (and with these individual and collective savings). The labourer is personally affected, but so too are markets. Further, low wages and poor working conditions such as long hours or impacts on health can have detrimental effects on reproductive labour, so that there is insufficient care for children and the elderly, and with this broader effects on the underlying fabric of society. Social unrest and crime have been long linked to systemic poverty and social forms of deprivation. Further, a lack of voice to challenge employer practices can mean that those who sell their labour, who are also often residents in the locality in which they work, lack the ability to challenge poor environmental practices which then may go on unabated with profound consequences to them in their homes and nearby. These negative sustainability effects can, in turn, can lead to societal break-down and, as we shall see in the context of cross-border trading, a lack of trust between States, already evident in rising forms

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159 Kate Raworth, Doughnut Economics: Seven Ways to Think Like a 21st Century Economist (Cornerstone Books, 2017).

160 See the UN Resolution of 2015 at n.? above.
of nationalism, which present a threat to ‘universal peace’ on which our current international legal system is predicated.\textsuperscript{161}

\textbf{B. The UN Sustainable Development Goals and their relevance to work}

In considering how labour standards and their implementation are relevant to sustainability, the UN Sustainable Development Goals (SDGs) of 2015 exemplify the potential for connections.\textsuperscript{162} The SDGs reflect an important global consensus. The academic community may not consider the way in which each goal is formulated to be perfect (an example being the inclusion of collective bargaining and freedom of association only as an indicator of rights of work in SDG 8.8.2), but each of the seventeen SDGs does reflect a significant achievement of unity of purpose from the international community. This is why the 2030 Agenda offers a key opportunity to the ILO, European institutions and their members to forge alliances and engage in regulatory innovation to promote the achievement of these shared goals. Further, SDG 8 with its explicit acknowledgement of the commitment to ‘decent work for all’ amounts to a timely recognition of the ILO’s agenda and the influence of the 2008 Declaration on Social Justice for a Fair Globalization.

Other SDGs of course have significant implications for labour standards, not least of which are SDG 5 regarding gender equality, SDG 10 which aims to reduce inequalities within and among countries and SDG 16 recognising access to justice and participatory institutions. Migrant workers are acknowledged to be entitled to the protection of labour rights and safe and secure working environments under SDG 8.8, which is significant given their propensity to exploitation and extreme vulnerability when temporarily present in European and other States.\textsuperscript{163} The more specific issue of transaction costs of migrant worker remittances is dealt with in SDG 10.10. More meaningfully perhaps, in SDG 10.9 comes the injunction to

\begin{thebibliography}{99}
\bibitem{161} Tonia Novitz, ‘Freedom of Association: Its emergence and the case for prevention of its decline’ University of Bristol Law research papers series 2018/02 available at: \url{http://www.bris.ac.uk/media-library/sites/law/Jan18\%20research\%20paper\%202\%20Novitz\%20MERGED\%20final.pdf}.
\end{thebibliography}
‘facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies’.

Further, the SDGs refer to emerging concerns regarding trade and investment, which could further sharpen the attention of ILO activity and European reform. There is what might seem to be an anomalous target in SDG 8.A to: ‘Increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries’.

Partnering aid with trade enables the building of capacity at national level in the South, with the potential to enhance human functionings and capabilities without which decent work becomes unlikely. What is vital is that the EU does so fairly and transparently, without imposing conditions it would not follow itself.

SDG 10.8 also tackles the issue of trade, acknowledging that implementation of special and differential treatment in the World Trade Organisation (WTO) agreements could have a significant impact on achieving not only economic benefits, but also greater social and political inclusion in the global economy. To do so, offers scope for genuine participation in global value chains and options for ‘full employment’ in countries in the North and the South (see SDG 8). This target can be read in tandem with that of SDG 17.10 which calls for an ‘equitable multilateral trading system under the World Trade Organization’. Presumably, this call for just rules of trade would extend beyond trade in goods to trade in services, which is leading to temporary migrant labour flows and consequent forms of injustice at work.

While SDG 8 comes up for review before the High Level Political Forum (HLPF) only in 2019 (on the centenary of the founding of the ILO), it is notable that SDG 17 is considered by the HLPF every year and that concerns relating to work can and should be raised in that context.

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Of obvious additional relevance is foreign direct investment, namely the ‘financial flows’ in SDG 10.9. Again, we can see connections to SDG 17.5 and the urge to ‘adopt and implement investment promotion regimes for least developed countries’. Free trade agreements (FTAs) (to which the General Agreement on Tariffs and Trade (the GATT), Article XXIV and GATS, Article V and Vbis, give permission), particularly the mega-regional agreements which include investment chapters can affect the ability to improve labour standards in any given state. For example, the indirect expropriation principle when combined with non-transparent investment arbitration can inhibit the right to regulate labour standards. If decent work is to be taken seriously as an objective (as would follow from the objective of policy coherence), then these provisions must be read with awareness that what matters is not only the influx of investment but the uses to which they are put and the terms on which they are given.

A route to addressing ‘durability’ is arguably civil and political participation, as is recognised by SDG 16 seeking ‘peace, justice and strong institutions’. This can be linked to the issues of the ‘governance of work’ raised above. While more elaboration and implementation are clearly needed to make that goal feasible, its inclusion in the UN 2030 Agenda is significant. Participatory engagement has the benefit of enabling adjustment of standards to contemporary realities (architecture) and concerns (social norms), while enabling regular review of the potential regulation of markets and the scope for legal intervention.

C. EU ‘Policy Coherence for Development’

The story of ‘Policy Coherence for Development’ (PCD) has evolved over more than a decade. Firstly, the EU has never sought to adopt its own distinctive critical perspective on what constitutes ‘development’. Instead, PCD is born of an awareness of the need, not only to integrate EU policies around a common objective but also with ‘development’ as defined by the international community. As a result, there has been a shift in emphasis from the

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167 As discussed above and also see David Cheong and Franz Christian Ebert, ‘Labour law and trade policy: What implications for economic and human development?’ in Colin Fenwick and Shelley Marshall (eds), Labour regulation and development (Edward Elgar, 2016).
fulfilment of the Millennium Development Goals (MDGs)\textsuperscript{168} to the achievement of the SDGs.\textsuperscript{169} Additionally, over this time, the areas of focus for PCD have narrowed such that they no longer include attention to broader environmental concerns beyond the remit of climate change or to the social dimension of globalisation, especially as regards promotion of decent work. The SDGs arguably give the EU an opportunity to expand the remit of the legitimate concerns of PCD and include labour standards more formally in the EU’s development remit. There are some signs that such an approach might be taken.

The first \textit{European Consensus for Development}\textsuperscript{170} was adopted in 2006, stressing the EU’s political commitment to PCD. Already, a Commission Communication had confirmed the determination of the EU to consider the extent to which PCD was achieved in certain key policy ‘priority’ areas: trade, the environment, climate change, security, agriculture, fisheries, the social dimension of globalisation, employment and decent work, migration, research and innovation, the information society, transport and energy.\textsuperscript{171} At this stage it was thought that ‘the effective improvement in the coherence of developed countries’ policies would put developing countries in a much better position’ to achieve the Millennium Development Goals (MDGs) by 2015.\textsuperscript{172} This was understood to mean that even in the EU itself: ‘Non-development policies should respect development policy objectives and development cooperation should, where possible, also contribute to reaching the objectives of other EU policies.’\textsuperscript{173} Development policy was no longer to be kept discretely in its own separate ‘box’. Considering issues of aid would not be sufficient; instead, the relevance of trade policies came to the fore. More broadly, ‘EU policies in areas such as trade, agriculture, fisheries, food safety, transport and energy have a direct bearing on the ability of developing countries to generate domestic economic growth’\textsuperscript{174}.

\textsuperscript{168} See \url{http://www.un.org/millenniumgoals/}.
\textsuperscript{170} See OJ C 46/1 24.2.2006 at \url{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AC%3A2006%3A046%3A0001%3A0019%3AEN%3APDF}.
\textsuperscript{172} Ibid., at 3.
\textsuperscript{173} Ibid.
\textsuperscript{174} Ibid, at 4.
In the *European Consensus for Development* document, itself, the substance of the development agenda was set out essentially in two short paragraphs. Para 6 observed that the ‘eight MDGs are to: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce the mortality rate of children; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability and develop a global partnership for development’. While paragraph 8 reaffirmed that ‘development is a central goal by itself; and that sustainable development includes good governance, human rights and political, economic, social and environmental aspects.’\(^{175}\)

By 2009, a decision had been taken to cluster these policy areas around five ‘PCD challenges’. These were to be: trade and finance, climate change, global food security, making migration work for development and strengthening links between security and development.\(^{176}\) Decent work was gone, with some potential for more limited work-related issues potentially arising in the sphere of migration.

The 2011 EU Communication on the Agenda for Change\(^ {177}\) expressed the Commission’s further determination to push the agenda. It spoke of a dissatisfaction with a simple focus on the MDGs: ‘people-led movements in North Africa and the Middle East have highlighted that sound progress on the MDGs is essential, but not sufficient. This leads to two conclusions: first, that the objectives of development, democracy, human rights, good governance and security are intertwined; second, that it is critical for societies to offer a future to young people.’\(^ {178}\) This was a much more ambitious document, which restored express concern with broader issues of environmental protection and economic growth, alongside civic responsibility. It also took a more critical perspective on what development could and should entail, observing ‘increased differentiation between developing countries’, as well as a role for emergent states as donors and engagement with ‘the private sector, foundations, civil society and local and regional authorities’.\(^ {179}\)

\(^{175}\) See OJ C 46/1 24.2.2006 at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AC%3A2006%3A046%3A0001%3A0019%3AEN%3APDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AC%3A2006%3A046%3A0001%3A0019%3AEN%3APDF).


\(^{178}\) Ibid., at

\(^{179}\) Ibid.
From this point onwards, the DG responsible for development cooperation (DEVCO) and the other directorates of the Commission took steps to measure the impacts of trade and investment on developing countries through:

- Impact Assessment Guidelines and the Better Regulation framework and
- a ‘toolbox’ for consideration by other DGs when externalising their policies.

The collective aim of these measures was to ensure PCD is mainstreamed across all Commission activities including preferential trade agreements – it was to be an internal and external goal and tool of the EU. Progress has been monitored through bi-annual PCD reports, the most recent of which was issued in 2015.\(^{180}\) Member States report their activities to demonstrate that PCD is mainstreamed, providing a snap-shot of the country situation. Through the monitoring process, the MS are accountable to the Commission but the reports also raise awareness with civil society. Findings have been disseminated through a ‘launch party’. EU delegations are now included in the reporting process, which marks a significant shift in the framework. They are required to report on their observed impacts of EU policies in developing countries. However, by 2015, the Council had become aware that the focus on the five priority areas might not be sufficient and asked ‘the Commission and the EEAS, in close consultation with other partners, to present concrete proposals on how to better integrate PCD into the EU approach to implementing the 2030 Agenda for Sustainable Development’, calling for ‘this new approach to be mainstreamed across the EU institutions’.\(^{181}\)

The new Consensus on Development was signed in June 2017\(^ {182}\) and replaces the previous decade-old version. It contains, in particular, a new chapter on PCD and a new chapter on the environment. The PCD chapter is more specific than the previous iteration but the concept is framed more concretely in the language of the 2015 SDGs so that, at least at the international level, PCD is situated within the 2030 Agenda through the monitoring and reporting requirements of the SDGs. The new Consensus notes that PCD is ‘a fundamental contribution to achieving the SDGs’\(^ {183}\) and will be operationalised through a rights-based approach to

\(^{181}\) Ibid at para. 8.
\(^{183}\) The New Consensus, above, para. 10.
development.\footnote{Ibid., para. 16.} It notes that universal values such as ‘democracy, good governance, the rule of law, and human rights for all’ are ‘preconditions of sustainable development’\footnote{Ibid., para. 61.} and, as such, the EU will promote universal values in its development policies. Much like the first Consensus in 2006, the EU continues to endorse a broad concept of development which acknowledges the economic, social, and environmental dimensions of development. Stating the aims of the new Consensus, paragraph 4 provides:

The EU and its Member States are committed to a life of dignity for all that reconciles economic prosperity and efficiency, peaceful societies, social inclusion, and environmental responsibilities…efforts will be targeted toward eradicating poverty, reducing vulnerabilities, and addressing inequalities to ensure that no-one is left behind.

The new Consensus stresses the existing priority areas, but sets these in a wider sphere of the 17 SDGs, which arguably entails a broader environmental agenda beyond climate change. SDG 8 which requires decent work and economic growth gets a brief mention (at paragraphs 22 and 33). What may be most significant is what is achieved by the further consultative process, recently initiated by the Commission to set up a new modus operandi for PCD.\footnote{https://ec.europa.eu/info/consultations/public-consultation-evaluation-european-unions-policy-coherence-development-2009-2016_en.} In this way the Commission slowly is approaching the idea of participatory institutions in SDG16, but one does wonder whether this is too little too late. While matters concerning social policy internally within the EU are to be the subject of discussion between the ‘social partners’, that is, representatives of management and labour, there is less scope for representation of a worker voice in the EU external relations. There are then dangers that the political modalities that have driven tariff preferences and aid funding to date may yet be repeated, even when protection of labour standards is said to be at issue.

The last point to make is that, as I have already explained, while the idea of combined policy coherence around internal labour law and external relations is very attractive, Europe is currently badly fractured. The continent is riven by different policy priorities as illustrated by the different labour market structures and labour laws of Mediterranean and Nordic States. Where, unfortunately, they seem to share a common denominator is in the growing forms of
nationalism and xenophobia that are emerging in places as diverse as Italy (with the Five Star Movement)\textsuperscript{187} and Sweden (the Swedish democrats).\textsuperscript{188} The UK in its endorsement of Brexit is no exception. In this, European States are defined more by their irrational hatred of the ‘other’, particularly migrant workers and central European governance, than by their coherent policy or unity. There is therefore a disjuncture between the idealism of the EU Commission in promoting PCD and the reality of what EU Member States want and how they behave. We have an urgent problem in Europe that will affect many workers which is not being addressed. That tension between Europe as it is and how many of us would like it to be shows no immediate signs of resolution. Without more open political engagement and debate (as per SDG 16) our future of work and of labour laws seems very uncertain indeed, as well as what Europeans will in their trading policies seek to impose on the rest of the world.

5. Conclusion

In this paper, I have sought to demonstrate that, while the ILO has been actively considering the ‘Future of Work’ and sustainability of future regulatory systems, the same issues have been the subject of debate at the European level. Legal and policy structures are in place at various levels in Europe to address what the ILO has identified as the drivers of change, and for consideration of:

- Work and society
- Decent jobs
- The organisation of work and
- Governance of work.

That is not to say that Europe is a shining example of progress. Rather, I have sought to present our complex intertwined regulatory systems, which do some good while also considerable harm.

It is hard to briefly summarise all my findings, but they could briefly be said to be the following:

\textsuperscript{187} ‘Five Star and League take Power in Italy’ in the Financial Times at: https://www.ft.com/content/2b7bd3d0-65ab-11e8-90c2-9563a0613e56.
While this paper has focussed on the future (or futures) of labour law from a European perspective, it may not be just labour law that needs to change, but also the rules of trade and investment, largely established by Europe which perpetuate exploitation and poverty in the global economy. Alongside this, although there was not time to investigate these other laws fully, company law and competition law (as well as public procurement laws) may also merit attention.

In considering the need for legal change, we might not only want to consider the potential for legislative reform, but the more incremental tools offered through human rights and other forms of litigation.

Sustainability and longer term durability of any future labour laws needs to be based on good governance. We are perhaps too concerned in this context with ongoing debates about the end of ‘command and control’ and the significance of reflexive governance. I doubt whether, in the context of labour law (given the power dynamics at play), a voice for workers can be achieved without any form of sectoral bargaining or a right to strike. Participatory institutions, such as works councils, also need to be fostered through positive regulatory encouragement at national, transnational corporate, regional and international levels. They are unlikely to be effective without strong trade unions, which means a return to promotion of lawful collective bargaining and industrial action. Without these measures, SDG 16 and the multifaceted regulatory solutions that could be realised by its operation are unlikely to be achievable.

Arguably, last but not least, current debates over the future of work arguably obscure a much more nasty trend in European States towards nationalism, isolationism and mistreatment of ‘foreigners’. These are also likely to have a tremendous impact on our futures of work and it is perhaps surprising that this growing problem has not attracted more attention in EU and ILO documents on the future of work.