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Labour Standards and Sustainable Development: Unpicking the EU's Approach

Rebecca Zahn* **& David Mangan****

This special edition contains a selection of papers presented at the conference *Labour Standards and Sustainable Development: Unpicking the EU's Approach*.[1] As the organisers of the conference and guest editors of this special issue, we are grateful to many, including: for their generous financial support, we thank the Society of Legal Scholars, UACES, the University of Bristol, School of Law and the University of Stirling, School of Law; the speakers and attendees at the conference in October 2014; and Professor Mia Rönmar, editor of this Journal, for the opportunity to publish the following papers. Below we briefly set out our motivation for creating this conference as well as the principles which guided its organisation. Finally we summarise the articles contained in this special issue and conclude with our thoughts on possible future directions for further research.

1. The Aim of this Conference

Sustainable development has become topical for policymakers and academics working in several disciplines. This is true of labour law, and in particular with regards to labour standards which are inextricably linked to the social, cultural and historical context of a country. These points were debated at an event hosted by the British Academy in 2009, which produced *The Role of Labour Standards in Development: From Theory to Sustainable Practice?*.[2] Drawing on that work, this conference aimed to unpick the European Union's (EU) sustainable development policies and to evaluate whether they 'fit' the locale by encouraging discussion amongst a wide-range of participants.

The global economic crisis challenged traditional thinking regarding labour markets. Additionally, the crisis intensified the search for sustainable methods of development which combine social and economic criteria in order to improve the living and working conditions of individuals. The approaches to sustainable development in the literature vary. The language of universal human rights is often invoked on the basis that development is a human right which 'every human person and all peoples are entitled to participate in, contribute to, and enjoy' (UN Declaration 1986). Sen has argued that development should be seen in terms of 'the expansion of the "capabilities" of people to live the kinds of lives that they value – and have reason to value'.[3] In the context of trade, the argument is made that multinational enterprises should shoulder responsibility in contributing to the improvement of living and working standards in these countries. A measure of the potency of development as an intellectual force is the argument that corporations are citizens of the world and as such must contribute.[4] Despite much theorisation of sustainable development, a central problem remains: successful enforcement.

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* University of Stirling.
** Osgoode Hall Law School.

[1] The conference website contains the agenda for the day as well as podcasts from two of the presenters (and contributors below), Professor Tonia Novitz and Professor Jeffrey Kenner: http://www.stir.ac.uk/arts-humanities/news-and-events/labourstandardsandsustainabledevelopmentunpickingtheeusapproach/

[2] T. Novitz and D. Mangan eds., (British Academy/Oxford U. Press 2011). Reviewed by R. Zahn, Int'l Comp. L. Quarterly 1024 (2012).

[3] A. Sen, *Development as Freedom*, 54-55 (Oxford. U. Press 1999).

[4] See for example, E. Potter and M. McCauley Sine, *Human Rights and Sustainability: A Corporate Perspective* in *Human Rights in Labor and Employment Relations*, 181-194 (J. A. Gross and L. Compa eds, Labor and

Consideration turns to whether sustainable development 'fits' the locale. Theories behind the 'fit' of sustainable development have been expounded in different contexts and focus on different themes (labour rights, etc). However, much of the debate surrounding the 'fit' of sustainable development policies has remained on a theoretical level. The contributions in this edition speak to this area of scholarship by using academic theories as a framework within which to consider practical perspectives on the topic. Particular emphasis is placed on the use of labour standards in achieving sustainable development. Such an approach is especially valuable in the context of the EU as the European Treaties oblige it to respect labour standards internally (Art. 3 TEU) but also, since the Treaty of Lisbon, to pursue 'sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' (Art. 21 TEU). From the outside, the EU is 'perceived as a normative power in social issues and an attractive partner, owing to the unique combination of economic dynamism with a social model.'[5] In this, it has the unique potential to successfully encourage sustainable development through labour standards amongst its twenty-eight member states as well as through a wide range of trade agreements.

The EU's commitment to promoting labour standards externally can be traced back to the early 1990s when the European Commission began to push for a social dimension to its external relations. In particular, the EU and its Member States focussed their attention on the promotion of 'the most fundamental standards linked with respect for human rights: abolition of slavery, forced labour and child labour, freedom to organise, and, the right to collective bargaining.'[6] Initial attempts at ensuring observance of these core labour standards concentrated on a hard law approach by advocating for the introduction of social clauses into trade policy in order to encourage respect for core labour standards by rewarding those countries that adhered to them. Driven by the establishment of the World Trade Organisation in 1994, numerous European governments, particularly France and Belgium, were in favour of linking labour standards with trade rules through the introduction of a social clause in the WTO rules. This was supported by the European Parliament and the Commission. The Trade Commissioner at the time, Sir Leon Brittan, opined that:

> this issue is a legitimate global concern, and cannot be taboo among participants in the world economy. […] The WTO must address problems such as child exploitation, forced labour or the denial to workers of free speech or free association. There must of course be fully adequate safeguards against unilateralism or protectionist abuse and developing countries must be able to benefit from their natural advantages, to exercise their right to economic development and to maintain domestic policies appropriate to their level of development.[7]

However, Germany and the UK along with other Member States opposed any type of social clause, arguing that the WTO is a 'trade organisation, not a social organisation'[8]. As a result, Member States could not agree on adopting a common position in response to a communication issued by the European Commission on 'the trading system and internationally recognised

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Employment Relations Association 2009).

[5] W.Eichhorst, M. Kendzia, J.B. Knudsen and D. Wahl-Brink, *External Dimension of EU Social Policy*, (IZA Research Report No. 26 2010).

[6] J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in (, *The European Union and the Social Dimension of Globalisation* (J. Orbie and L. Tortell eds., Routledge 2009), 6.

[7] Sir Leon Brittan, 'Statement at the Trade Negotiations Committee Meeting at Ministerial Level', Marrakesh, 12 April 1994.

[8] Quote from UK Minister of Trade Ian Lang, House of Commons Hansard Debates, 6 December 1996.

labour standards'[9] in the run up to the WTO's first Ministerial Conference held in Singapore in December 1996. A social clause was not adopted at this conference, the compromise instead being support for and recognition of the International Labour Organisation's (ILO) role in promoting core labour standards[10]. Although consensus was not reached on the issue of a social clause in the WTO context, the EU took the decision by a qualified majority vote in the Council to introduce labour standards conditionality into its trade regime.[11]

Since the early 2000s, the EU has moved away from its preference for hard law mechanisms and has increasingly turned to soft law instruments in order to promote a social dimension of globalisation. At the same time, there has also been a shift in focus from the core labour standards mentioned above to broader social and development-related objectives.[12] As Orbie and Tortell pointed out:

> From 2001, Europe's discourse and initiatives have changed significantly, with an increased emphasis on soft and development-related instruments and a broader definition of 'social' objectives. The European globalisation debate is no longer framed in terms of fair competition, but is more explicitly embedded in Europe's social and development discourse.[13]

Thus, in a communication on "Promoting core labour standards and improving social governance in the context of globalisation"[14], the European Commission indicated that it would not only focus on core labour standards but also on general issues of social governance. Thus, the EU has been active in "Promoting a European Framework for Corporate Social Responsibility"[15] by introducing voluntary ways such as social reporting in which Multinational Enterprises' compliance with labour standards can be monitored. Following this policy shift, the European Commission has also played an active role in the ILO's World Commission on the Social Dimension of Globalisation and stressed the exemplary character of the European Social Model and the OMC for international social governance.[16] In 2004, the Commission signed a Memorandum of Understanding with the ILO aimed at enhancing cooperation at all levels in order to make 'the greatest possible contribution to strengthening the social dimension of development cooperation.'[17] The Memorandum has led to EU co-funding of ILO initiatives and ILO involvement in the implementation of EU co-operation

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[9] European Commission, 'The trading system and internationally recognised labour standards' COM(1996)402 quoted in J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in *The European Union and the Social Dimension of Globalisation* (J. Orbie and L. Tortell eds., Routledge 2009), 6 – 7.

[10] V. Leary, 'The WTO and the Social Clause: Post-Singapore' (1997) 1 *Eur. J. Int'l. Law* 118, 119.

[11] J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in *The European Union and the Social Dimension of Globalisation* (J. Orbie & L. Tortell eds., Routledge 2009), 7.

[12] J. Orbie and O. Barbarinde, 'The social dimension of globalisation and European Union development policy: promoting core labour standards and corporate social responsibility' (2008) 30 *Journal of European Integration* 459.

[13] J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in *The European Union and the Social Dimension of Globalisation* (J. Orbie & L. Tortell eds., Routledge 2009), 8.

[14] COM(2001)416.

[15] COM(2001)366.

[16] J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in *The European Union and the Social Dimension of Globalisation* (J. Orbie & L. Tortell eds., Routledge 2009), 8.

[17] European Commission and International Labour Organisation, 'Memorandum of understanding concerning the establishment of a strategic partnership between the ILO and the Commission of the European Communities in the field of development', 2004, 1.

programmes and projects.[18] As Orbie and Tortell argued, 'the Commission's normative and development-oriented role in the ILO is less contested by EU member states than hard law activities related to labour standards conventions.'[19]

More recently, the Commission has published a communication on 'Decent Work for All'[20] where it outlined plans to address the issues of decent work in political discussion and cooperation in terms of bilateral and regional relations. It has also committed itself to promoting corporate social responsibility externally through trade incentives, development agreements and cooperation with the ILO and has formed a European Alliance for corporate social responsibility with the business community. The EU's approach to corporate social responsibility has been described as 'holistic' because it 'includes principles on human rights, labour standards and the environment, unlike other international initiatives which tend to include only one dimension of corporate responsibility, such as environmental issues.'[21] It is not however clear to what extent the EU's commitment to promoting labour standards internally and externally is first, appropriate to their locale and, second, implemented in practice.

In differing ways, the contributors evaluate the EU's internal and external sustainable development policies, thereby contributing to an enhanced understanding of the potential for sustainable development within and outwith the European Union.

2. The Contributions

This one-day conference brought together speakers from different academic disciplines, the European Parliament, the International Trade Union Confederation (ITUC) and civil society organisations to consider the role of the European Union in the promotion of successful sustainable development in the sphere of labour standards through its external actions. The contributions in this edition include the following.

With her keynote address entitled *The Paradigm of Sustainability in a European Context – Collective Engagement in Protection of Future Interests?*, Tonia Novitz established a compelling background for the ensuing presentations. While the treatment by the EU of sustainable development, whether concerning economic, social or environmental protection (or some combination of the three) is normally viewed in the context of EU external relations, its competence to act in the social sphere is limited. The main point of reference to determine the nature of EU competence is the Court of Justice of the EU's Opinion 2/91 on the division of competences between the European Community and the Member States to conclude an ILO Convention on Chemicals at Work. In its Opinion the Court first reiterated a previous opinion[22]

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[18] J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in *The European Union and the Social Dimension of Globalisation* (J. Orbie & L. Tortell eds., Routledge 2009) 9. Examples of activities include an EU-ILO action programme to facilitate access into primary education of children released from child labour within the framework of the ILO's International Programme on the Elimination of Child Labour or the mainstreaming of decent work objectives in the EU's development programmes.

[19] J. Orbie and L. Tortell, 'From the social clause to the social dimension of globalisation' in *The European Union and the Social Dimension of Globalisation* (J. Orbie & L. Tortell eds., Routledge 2009), 9.

[20] COM(2006)249

[21] A. Gatto, 'Corporate Social Responsibility in the External Relations of the EU' (2005) 24 *Yearbook of European Law* 423, 435.

[22] Opinion 1/76.

where it stated that 'whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.'[23] Based on this reasoning, the Court ruled that external Community competence is exclusive in areas where the Community has already adopted harmonising legislation. However, the Court went on to clarify that the nature of Community competence also depends on the scope of the measures in question. Thus, whenever the EU sets minimum labour standards, as is the case most of the time, the Community and Member States share external competence. This effectively limits the competence of the EU to those areas in which it can act internally, thereby excluding most collective labour rights and competence in respect of setting wage standards, both of which could be of particular importance when working towards a social side to globalisation. Cooperation with Member States in external social policy also deprives the EU of the ability to act with one voice and diverging interests between Member States and the EU institutions have the potential to hamper the development of an effective and coherent external social policy. Thus, in order to understand the EU's scope for action externally, one must begin with its potential for developing an internal commitment to sustainability in the sphere of labour standards. Tonia Novitz argued that sustainable economic, social and environmental solutions, which are of course likely to be entangled in a variety of ways, require broad-based participatory processes in order to be achieved and, of course, to be durable. In the context of work, it seems likely that collective bargaining through trade unions offers one of the best prospects of such engagement and dialogue. Trade unions offer workers a voice independent from their employers and are still the largest NGOs across Europe. And yet, in order for trade unions to fully engage in policy-making on matters of 'sustainability', they must have the legal capacity to do so. In other words, they must be allowed to address and bargain over social policy for the future. Her article investigated how the capacity of trade unions to address sustainability has been obstructed by facets of EU law and the application of the European Convention on Human Rights within the Council of Europe. She argued that trade unions are deprived of the legal means to address future interests vital to their relevance but concludes that the European Commission's proposals for Europe 2020 offer hope for a future policy shift and enhanced institutional support for participation by trade unions.

The subsequent contributions then turn to the external dimension of the EU's commitment to promoting labour standards. The title of Lore van den Putte and Jan Orbie's contribution, *The Surprising Rise of Labour Provisions in EU Bilateral Trade Agreements*, expressed both the article's objective as well as the authors' sentiment on the topic: labour provisions in EU bilateral trade agreements have widened and deepened over the past decade despite the coming into power of centre-right governments in the mid-2000s and a stronger liberalization agenda since 2006. In explaining 'this rather remarkable evolution', the authors discerned that 'social trade has become an unobjectionable norm within the EU.' They warned, however, of the possible consequences for labour provisions of equating labour and environmental provisions under the sustainable development umbrella.

While Van den Putte and Orbie adopted a theoretical approach to examining the EU's incorporation of labour provisions in the EU's trade agreements, Jeffrey Vogt, Legal Advisor for the International Trade Union Confederation, provided a practical insight into their

[23] At para. 7.

effectiveness. His contribution reviewed the development of the labour obligations in recent EU trade agreements to identify the structural flaws that weaken the effectiveness of these instruments – most particularly the absence of any mechanism to arbitrate disputes over labour rights obligations or the possibility of fines or sanctions in the case of a breach of those rights. As the EU provides generous market access under the Generalised System of Preferences (GSP) arrangement, he contended that egregious labour rights violators continue to benefit from these preferences. Moreover, GSP+ has been granted to countries where abundant evidence has indicated serious violations of the ratified ILO conventions prior to being granted the trade preferences. A common problem with all such arrangements has been the political, rather than legal, nature of the enforcement regimes. In all cases, decisions whether to enforce have been complicated by foreign policy considerations, as well as commercial impacts on importers. As such, these tools are used only reluctantly and after lengthy campaigns to pressure governments to act.

A second insight from practice was provided by Karin Ulmer of APRODEV. She contended that the EU is choosing to define and defend the development and trade nexus within the trade liberalisation paradigm. While this could boost the stance of social clauses or human rights provisions, Ulmer argued that the EU restrains itself from using its direct power on matters relating to social, environmental and human rights, thereby resulting in subservient and toothless development objectives.

Finally, Judy Fudge's *Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive* offered a noteworthy and topical discussion. While most of the focus regarding the EU's development agenda has been on trade (as attested to by contributors herein), there has been an explicit linkage between migration and development objectives. In 2011, the European Commission launched the Global Approach to Migration and Mobility (GAMM), which lists 'maximizing the development impact of migration and mobility' as one of its four pillars. A distinctive feature of the GAMM's approach is that migrants are placed at the centre and their human rights are to be mainstreamed throughout the migration cycle. Assessing this aim, Fudge asked the prescient questions: 'To what extent is the GAMM's commitment to migrants rights being put into practice? How does the GAMM's emphasis on migrant's rights impact upon development?'

3. Conclusions

This project engaged with the European Union's approach to labour standards and sustainable development for two reasons: first, the remarkable number of negotiations (and agreements) being conducted simultaneously; and second, the tremendous social possibilities therein. The EU has great potential to realise distributional benefits through its trade agreements. The contributors to this collection individually evidenced the inclusion of labour standards clauses as well as the absence of enforcement mechanisms. This halfway point towards achieving social goals remains unsatisfactory. (Perhaps a reason for this half measure is the irony of neoliberalism's need for a strong state in order to effect these economic goals.[24]) The papers in this collection critically evaluated recent events and those in-progress to offer enhanced means by which social goals (obligations under EU Treaties) may be achieved within the (now dominant) trade agreement paradigm.

[24] D. Harvey, *Neoliberalism: A Brief History* (Oxford U. Press 2007), 117.

With such a dynamic topic as sustainable development and labour standards, there are a number of next steps forward that may be taken. Underlying the ensuing contributions is a critique of legal institutions as the mechanisms for enforcement of labour standards. Furthermore, one may question whether the exclusively economic motivations for the EU's trade negotiations and agreements should be a linchpin for sustainable development goals. Taking from the present project, we maintain that future engagement of this topic employ interdisciplinarity in order to appropriately engage with this formidable landscape. We remain hopeful that the breadth of contributions widens moving forward. Consideration should also include a broader sample of countries representing developed, developing and underdeveloped countries in order to test whether academic theories are appropriate or may further contribute to successful sustainable development within these countries.

Finally, it has been our aspiration to continue a dialogue on this prescient topic and we hope this collection will serve that aim. To that end, we suggest that education be a further consideration moving forward, in particular the question: is an effective system of education a necessary precursor to sustainable development in labour standards? Sen's notion of capacity building remains influential. And yet, training and education would seem to be necessary aspects of capacity building because activating the opportunities which trade agreements are said to facilitate requires a knowledge base. This is not simply education as book-learning but also tutelage in skills. We raise this matter for governments around the world have looked to education as a key strategy for economic self-help. Moreover, education necessarily engages the collective aspects of capacity building (recalling the arguments made by Tonia Novitz in this volume regarding the role of trade unions). For example, it requires plans to be made for the development of a country's varied workforces. Education speaks to a system in which capacities are not only developed but contribute to a long-range plan of sustainability.