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The European precariat: the protection of precarious workers in the European Union

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Part I: The Development of Labour Markets and the Rise of Precariousness

Chapter 2: The De-standardisation & Precariatisation of Employment

1 INTRODUCTION

The following chapter will explain the development of labour markets throughout the period of European integration and how precarious employment can be understood in the context of this legal thesis. The regulation of labour markets and employment in Europe has always been dominated by the question of whether labour should be treated as a commodity to be bought and sold, and the extent to which individual workers should be protected from the of the market. This tension was prominent in the context of European integration, as following the Second World War, European law and policy makers shifted towards what is described as the *standardisation* of employment, which stemmed from embedded liberalism ways of thinking about the economy and resulted in the hegemony of the standard employment relationship and the establishment of the modern welfare state. However, since the 1970s and 1980s, there has been a shift away from standardised employment and universalist welfare systems. This has been part of the general shift towards neoliberal ways of thinking about the economy, which in the context of labour market regulation has shifted the focus away from the SER and towards more flexible employment and competitive labour markets. This can be referred to as the *de-standardisation* of employment. The *de-standardisation* of employment has resulted in increasing levels of non-standard employment, as well as welfare systems based on responsibility and activating labour market policies. Since the Global Financial Crisis, this shift became more pronounced, with employment at risk of veering from de-standardisation to precariatisation. Whilst difficult to define, the main traits of precarious employment are increased (involuntary) insecurity at work, as well as a greater power imbalance between employer and employee (at least when compared to standard employment). Precarious employment, at least within the context of this thesis, can be classified on the basis of: (i) extremely limited or on on-demand work; (ii) short-term and intermittent work, and (iii) bogus and precarious forms of self-employment.

2 THE DEVELOPMENT OF LABOUR MARKETS PRE-EUROPEAN UNION

During negotiations between the EU and the UK following the UK's decision to leave the European Union, the Union was keen to stress that the four 'fundamental freedoms' of goods, services, persons, and capital, that make up the internal market under Article 26 TFEU were indivisible, and that the UK could not engage in "cherry picking" by seeking to gain preferential treatment in respect to one of these over the others.¹ The indivisibility of these freedoms is the traditional perspective on the internal market, even if this is not quite as accurate as is often claimed.² Claims of indivisibility between the freedoms mask the fact that labour, or more accurately the worker that performs such labour, is clearly not in the same position as other factors of production such as goods and services as they are individual

¹ European Council (Art. 50) guidelines for Brexit negotiations (220/17) 29th April 2017, para. 1; see also Editorial Comments, 'Is the "indivisibility" of the four freedoms a principle of EU law?' (2019) 56(1) *Common Market Law Review* 1.

² C. Barnard, 'Free Movement vs. Fair Movement: Brexit and Managed Migration' (2018) 55(special) *Common Market Law Review* 203.

human beings rather than tangible or intangible objects, a point which needs to be recognised when regulating labour markets.

The modern idea of the labour 'market' did not exist prior to industrialisation. In feudal times, an individual's economic status and life opportunities were not governed by their ability to sell their labour on the market, but rather through "trust, solidarity and security".³ This meant that a person's life prospects were primarily determined by their social class, which itself was defined through the "family, church, or lord".⁴ There were limited labour market mechanisms based on supply and demand, which could cause wages to fluctuate following major events such as the Black Death,⁵ however, this cannot be understood equating to a functioning market society as it is understood today.⁶ During the 18th century, the rigid hierarchical structures of feudalism began to break down. Large-scale agriculture gradually replaced small farms, leading to the mass dislocation of many peasants and farmworkers, who were suddenly without work and having to compete with their peers for manual employment at the newly established mills and factories in urban areas. As labour became free from the confines of feudalism and this new class of industrialised proletarian workers began to compete with one another, it led to claims that labour was "a commodity, just like every other, and rises and falls according to demand",⁷ and that "like all things that can be purchased and sold, and which may be increased or diminished in quality, has its natural and its market price".⁸ Adam Smith considered this commodification of labour to be a good thing that would improve the prosperity of workers: "if things were left to follow their natural course, where there was perfect liberty, and where every man was perfectly free to choose whatever occupation he thought proper and to change it when he thought proper".⁹

The problem with this perspective is that labour is clearly not a commodity "like any other". Already in the 19th century this perspective as claimed to be a "very narrow" and "false" concept that equates labour to an independent entity and ignores the "needs, nature and feelings" of the individual concerned.¹⁰ Unlike other goods and services, labour is not an inanimate object. It is inherently and inextricably linked to the person that performs it. Dealing with labour requires dealing with the demands of workers as individuals,¹¹ creating a bond with a person rather than an abstract concept.¹² In other words, labour cannot be treated just like any other commodity, as unlike other commodities the workers that perform labour must eat, sleep, survive, prosper, and reproduce both themselves and the society in which they

³ M. Goldmann, 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' (2017) 23(3-4) *European Law Journal* 272-289, p. 275.

⁴ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990) Polity Press: Cambridge, p. 35.

⁵ *Ibid*, p. 38.

⁶ On this point, see the diverging views of S. Hejeebu, and D. McCloskey, 'The Reproving of Karl Polanyi' (1999) 13(3-4) *Critical Review* 285-314, p. 285, and M. Blyth, 'The Great Transformation in understanding Polanyi: Reply to Hejeebu and McCloskey' (2004) 16(1) *Critical Review* 117-133, p. 122.

⁷ D. Ricardo, *On The Principles of Political Economy and Taxation* (1817), see 'Chapter 5: On Wages'.

⁸ A. Smith, *The Wealth of Nations* (2012) Wordsworth, London, pp. 167 – 169; see also E. Burke, *Thoughts and Details on Scarcity* (1795).

⁹ A. Smith (n 8), p. 104.

¹⁰ J.K. Ingram, *Work and the Workman. Being an Address to the Trades Union Congress in Dublin September 1880* (1880), Hanse Books: Norderstedt.

¹¹ K. Marx, *Das Kapital: Volume One* (1867) Pacific Publishing: New York, pp. 557 – 564.

¹² S. Evju, 'Labour is not a Commodity: Reappraising the Origins of the Maxim' (2013) 4 *European Labour Law Journal* 222, p. 224.

live.¹³ They must consider their economic livelihood, physical and mental health, the prosperity their family and of society in general. As Benjamin Franklin once said (albeit in the context of slavery): “other cargoes do not rebel”.¹⁴ The Covid-19 pandemic has clearly shown how economies can survive without certain goods and services being available during lockdowns, however, removing labour from the economy requires strong state support becoming available to them to avoid the significant social problems that would have inevitably arisen without it.

There is also an ideological tension surrounding the question over the extent to which labour should be treated as a commodity. The liberal perspective originating from Smith who, whilst never advocating for the removal of all social protections, believed that the formation of free markets would ensure that all who want to be employed and prosper will be able to do so.¹⁵ This liberal perspective on labour markets considers them to be essentially meritocratic in nature, and that those who become unemployed or fall into poverty are blameworthy as they failed to make use of the emancipatory qualities of the market.¹⁶ The more extreme adherents of this perspective see social protections as damaging to society *per se*, as it is claimed that they encourage “moral corruption, idleness, and drunkenness” and therefore increase poverty.¹⁷ Previous attempts to implement a social wage as a buffer against *laissez-faire* capitalism, thereby ensuring the “traditional guarantees of feudal society”,¹⁸ are suggested to have unwittingly stifled competition and prevented the formation of organised labour that would have allowed workers to improve their material situation directly.¹⁹ This meant that workers were, at least initially, grateful to see the establishment of virtually an unfettered and unregulated labour market.²⁰

However, it soon became clear that an unfettered labour market was even more damaging to workers. Whilst it led to an unprecedented era of productivity and wealth, at the same time it made the physical health and mental condition of the average worker “utterly miserable”.²¹ The removal of social protections led to widespread exploitation, and extreme levels of inequality and social deprivation. The only form of welfare were workhouses where destitute individuals could find food and shelter, however, once they entered it became impossible to leave, earning them the name the “prisons for the poor”.²² This was the true consequence of treating labour as a commodity like any other: an over-supplied labour market where workers had to accept ever-lower wages and ever-worsening working conditions, thereby resulting in a negative spiral.²³ Workers lost their humanity as they were forced into fierce competition

¹³ See, for example, Chapter 23 in K. Marx (n 11).

¹⁴ Y. Varoufakis & D. Groutsis, ‘The Trouble with Labour’ (2010).

¹⁵ G. Esping-Andersen (n 4), p. 42.

¹⁶ Ibid.

¹⁷ F. von Hayek, *Road to Serfdom* (1944); M. Friedman, *Freedom and Capitalism* (1962).

¹⁸ G. Esping-Andersen (n 4) p. 36; see also K. Polanyi, *The Great Transformation* (1944). The Speenhamland Laws were a response to increasing poverty and destitution in rural England as a result of the partitioning of land. It established a social wage linked to the price of bread.

¹⁹ K. Polanyi, *The Great Transformation* (1944), pp. 82-83.

²⁰ M. Goldmann (n 3), p. 275

²¹ See F. Block, ‘Karl Polanyi and the Writing of the Great Transformation’ (2003), p. 279.

²² R. Oastler, *Damnation! Eternal Damnation to the fiend-begotten ‘coarser-food’, new Poor Laws* (1837).

²³ G. Esping-Andersen (n 4), p. 3.

with one another,²⁴ and poverty became a necessary consequence of the system.²⁵ This can be understood as an extreme form of labour commodification, whereby social protections are removed from workers and they are increasingly reliant on the market for their survival.

The period of *laissez-faire* capitalism demonstrated the problems of labour commodification and a lack of social protection. Karl Polanyi claimed that the application of market mechanisms to ‘false commodities’ like labour that are deeply rooted in the historical context of society is a self-defeating task.²⁶ Markets cannot be “freed” from society, because they are formed and maintained through politics and society: “all economies, and economic behaviour, are enmeshed in non-economic institutions”.²⁷ They are ‘socially embedded’ into the socio-cultural obligations, norms and values that exist within a society. The more social protections are removed in the pursuit of the “stark utopia” of self-regulating markets,²⁸ the more society will react against it through counter-movements that seek to protect individuals from the negative consequences of the market.²⁹ In other words, society checks the growth of markets in order to protect itself.³⁰ This means that subjecting commodities like labour entirely to market mechanisms is simply impossible to achieve.³¹

Therefore, the industrial revolution and the formation of labour markets saw a reduction in the protection available to individuals. As society shifted from feudalism to the industrial age, the role of the state was reduced to establishing and safeguarding a self-regulating market,³² with institutions such as the workhouses becoming part of this system. Social protection includes not just concrete laws and rules, but also “ideas, rules, and institutional structures”, that shifted in favour of unfettered markets.³³ However, the removal of social protections meant removing part of the fabric of society, which resulted in counter-movements against markets. These movements are not inherently progressive. Whilst they can take the form of movements supporting the five-day working week or other employment protections, they can also take the form of authoritarian dictatorships.³⁴ Indeed, Polanyi blamed the rise of fascism in Europe in part on the role of *laissez faire* capitalism of the pre-war era.

3 BRETTON WOODS AND THE POST-WAR CONSENSUS OF EMBEDDED LIBERALISM

The problems of labour commodification and *laissez-faire* capitalism meant that, following the Second World War, there was a widespread consensus that the economic conditions that led

²⁴ Ibid, p. 36.

²⁵ Fabien Bottini, ‘The Roots of the French Welfare State’ (2013), 643, p. 653.

²⁶ K. Polanyi (n 19).

²⁷ D. Ashiagbor, ‘Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration’ (2013), p. 305; J. Caporaso & S. Tarrow, ‘Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets’ (2009) 63(4) *International Organization* (CUP) 593-620, p. 598.

²⁸ K. Polanyi, *The Great Transformation* (1944), Chapter 6; F. Block, ‘Karl Polanyi and the Writing of the Great Transformation’ (2003), p. 282.

²⁹ J. Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order’ (1982), p. 385. See also, C. Kindleberger, *The World in Depression 1929-1939* (1973), p. 32.

³⁰ D. Ashiagbor (n 27), p. 304.

³¹ F. Block (n 21); See also, J. Caporaso & S. Tarrow (n 27), p. 596.

³² J. Ruggie (n 29), p. 386.

³³ F. Block (n 21), p. 299.

³⁴ J. Caporaso & S. Tarrow (n 27), p. 596; M. Goldmann (n 3), pp. 274 – 275.

to the Great Depression and the rise of fascism in Europe should not be repeated. At the Bretton Woods Conference of 1944, it was concluded that the economic policies of the pre- and inter-war eras were too focused on the subordination of internal social policy by external financial policy.³⁵ Opposition to the idea of the self-regulating market was prominent within the conference, with Keynes particularly vocal in his criticism: “to suppose that there exists some smoothly functioning automatic mechanism of adjustment which preserves equilibrium if only we trust to methods of *laissez-faire* is a doctrinaire delusion which disregards the lessons of historical experience without having behind it the support of sound theory”.³⁶ It was therefore concluded that nations should have more democratic control over social security and economic stability. The main objective was to reign in the power of banks and global finance, and to allow for more state intervention in the economy. This resulted in the re-nationalisation of many central banks (thereby allowing them to play a greater role in domestic policy), and Governments became increasingly active in terms of intervention in the domestic economy to regulate price levels, employment rates, etc.³⁷ Whilst there was not total agreement over the “form and depth” of state intervention, there was little disagreement over the final objective.³⁸ Such demands were “very nearly universal, coming from all sides of the political spectrum and from all ranks of the social hierarchy”.³⁹

The outcome of Bretton Woods should not be seen as a countermovement against free markets.⁴⁰ Whilst it gave more weight to the role of national social protection, its main aim was actually to re-establish multilateralism and global markets. However, what distinguished this from the preceding *laissez-faire* system was the “crucial component” of embedding international trade liberalisation into the democratic choices regarding domestic social policy that were made at the national level.⁴¹ Unlike the previous system, it would “safeguard and even aid domestic stability” as this multilateralism “would be predicated upon domestic interventionism”.⁴² In essence, greater openness in the international economy was coupled with measures cushioning the domestic economy from external disruptions.⁴³ It was considered that this multilateralism was compatible with the requirements of domestic stability and encouraged the division of labour, including the notion of comparative advantage, but would also minimise “socially disruptive adjustment costs” and “national economic and political vulnerabilities”.⁴⁴ Simply put, the idea was to make international monetary policy conform to domestic social and economic policy, and not the other way around.⁴⁵ The social protection of workers was a crucial aspect of this embedded system, as it was considered that this more socially-minded system of global trade would become “welfare-

³⁵ J. Ruggie (n 29); A. Eckes, *A Search for Solvency: Bretton Woods and the International Monetary System, 1941 – 1971* (1975); G.J. Ikenberry, ‘The Political Origins of Bretton Woods’, in Michael D. Bordo and B. Eichengreen, *A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform* (1991).

³⁶ J. Ruggie (n 29), p. 388.

³⁷ Ibid, p. 390.

³⁸ Ibid, p. 394. See also D. Ashiagbor (n 27), p. 306.

³⁹ J. Ruggie (n 29); See also A. Eckes (n 35).

⁴⁰ J. Caporaso & S. Tarrow (n 27).

⁴¹ D. Ashiagbor (n 27).

⁴² Ibid, p. 393.

⁴³ Ibid, p. 405.

⁴⁴ A. Eckes (n 35).

⁴⁵ J. Ruggie (n 29), p. 390.

improving, rather than welfare diverting".⁴⁶ Embedded Liberalism therefore essentially meant that global markets were embedded into domestic social policy, in particular national systems of solidarity relating to redistribution and the provision of public services, thereby ensuring that democratic institutions were able to influence and control such market mechanisms.⁴⁷

3.1 Standardised Employment

As well as re-establishing the multilateral global order, the reaction to *laissez-faire* capitalism also resulted in a convergence in the objectives and aims sought by nation states. There was a shared legitimacy of a set of social objectives to which the industrial world had moved towards, albeit unevenly, but certainly as a 'single entity'.⁴⁸ Political discourse shifted, resulting in rival political parties unwilling to shift too far away from the common consensus.⁴⁹ This convergence predominantly centred around demand-side, Keynesian economics, although it should be noted that Keynesianism acts as a linguistic 'catch-all' term that encompasses all demand-based economic and social policies that were hegemonic in Europe and the US during this period.⁵⁰

Keynesian labour markets focussed on full employment and powerful trade unions, which tended to combine strong wage increases with high rates of inflation. Keynesian labour market policies tended to ensure that individuals were engaged on the 'standard employment relationship' (SER), sometimes referred to as 'Fordism', which became the norm for the regulation of labour markets in developed nations.⁵¹ The SER is defined as a "stable, socially protected, dependant, full-time job ... the basic conditions of which (working time, pay, social transfers) are regulated to a minimum level by collective agreement and/or social security law".⁵² SER jobs during this periods were often "long-term, stable, fixed-hour jobs with established routes of advancement, subject to unionisation and collective agreements ... facing local employers whose names and features they were familiar with".⁵³ The 'founding premise' of the SER is that full-time, permanent positions are necessary in order to guarantee a family wage, an adequate level of social protection, as well as redressing the power imbalance between employees and employers.⁵⁴ Moreover, there tended to be a deeper relationship

⁴⁶ M. Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (2002) CUP: Cambridge.

⁴⁷ See, amongst others, S. Kramer, *International Regimes* (1983) Cornell Publishing, Ithaca; D. Harvey, *A Brief History of Neoliberalism* (2005); P. Armstrong, A Glynn, and J. Harrington, *Capitalism since World War II: The making and breaking of the long boom* (1991); G. Standing, *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2016); M. Goldmann (n 3); G. Esping-Andersen (n 4); J. Ruggie (n 29); J. Cremers, 'Non-standard employment relations or the erosion of workers' rights' (2010).

⁴⁸ J. Ruggie (n 29), p. 398.

⁴⁹ M. Blythe, *Austerity: The History of a dangerous idea* (2013).

⁵⁰ M. Blyth (n 46), p. 126.

⁵¹ P. Schoukens and A. Barrio, 'The changing concept of work: when does typical work become atypical' (2017) 8(4) *ELLJ* 306, p. 307; F. Hendrickx, 'Regulating New Ways of Working: From the new 'wow' to the new 'how'' (2018); see also G. Standing, *The European Precariat: The New Dangerous Class* (2011); J. Cremers (n 47).

⁵² A. Koukiadaki & I. Katsaroumpas, 'Temporary contracts, precarious employment, employees' fundamental rights and EU employment law' (2017), DG for Internal Policies (European Parliament) PE 596.823, p. 19.

⁵³ G. Standing (n 51), p. 7.

⁵⁴ G. Bosch, 'Towards a New Standard Employment Relationship in Western Europe' (2004) 42 *British Journal of Industrial Relations* 617; see also A. Koukiadaki & I. Katsaroumpas (n 52), p. 19.

between employer and employee; with the guarantee of a private pension as well as other non-wage benefits associated with employment.⁵⁵ Whilst employment during this time should not be romanticised, given the lack of social protection in certain areas such as health and safety, the SER served to minimise the commodification of labour and the exploitation of workers through a heightened sense of security and stability. This significantly improved the social protection of workers, at least when compared to the pre-war era of laissez-faire capitalism.

3.2 The Welfare State

As well as changing employment norms, this period of Keynesian domestic policies also resulted in the establishment of the modern welfare state and policies of redistribution.⁵⁶ It was considered that workers should be provided a residual layer of protection – or a safety net – against the risks of engaging in the labour markets. Again, Keynes was instrumental in establishing the modern welfare state in Europe, which centred around social security entitlement, which should be “(the UK’s) policy abroad for the peoples of all the European countries, no less than at home”.⁵⁷ This social security entitlement was envisaged as constituting family allowances and redistributive transfers deriving from income tax, as well as wider social policies such as educational reform, universal healthcare, and the nationalisation of key public services and industries. The demands of many political actors were similar in this regard,⁵⁸ with all the founding Member States of the EEC incorporating normative foundations of the welfare state into their constitutions.⁵⁹

Whilst the direction of travel was clear, the construction of the welfare state varied between nations. Britain followed its universalist ‘Beveridge’ system, which unified various pre-existing schemes into a single weekly flat rate contribution calculated to ensure a minimum standard of living when earnings were interrupted.⁶⁰ The Beveridge model differed from other European systems as it was not based on contribution, but universalist in nature and financed by general taxation.⁶¹ The German system, on the other hand, was based on its own Sozialstaat established by Bismark in the 19th century.⁶² This concentrated on ensuring social insurance covering sickness, workplace fatality, disability, and old age. Whilst the Sozialstaat continued throughout the Nazi era, increasing groups of persons were excluded from its protection, such as Jews, Gypsies, and political dissidents.⁶³ Following the end of the Nazi regime, the German Constitution established the Sozialstaat as an unalterable principle of the new democracy. However, Germany still retained its ‘Ordoliberal’ model and did not shift entirely towards Keynesianism, given the negative connotations associated with significant state intervention

⁵⁵ P. Schoukens & A. Barrio (n 51).

⁵⁶ P. Arestis, and M. Sawyer, ‘Keynesian Economics for the New Millennium’ (1998) 108(446) *The Economic Journal* 181.

⁵⁷ Keynes’ Memo on War Aims. As contained in P. Addison, *The Road to 1945: British Politics and the Second World War* (1994), p. 168.

⁵⁸ *Ibid*, pp. 164 – 189.

⁵⁹ S. Giubboni, ‘Social Rights and Market Freedom in the European Constitution: A Re-Appraisal’ (2010).

⁶⁰ P. Addison (n 57), p. 213.

⁶¹ F. Bottini (n 25), p. 656.

⁶² *Ibid*, p. 654.

⁶³ L. Leisering, ‘The Welfare State in Postwar Germany – Institutions, Politics and Social Change’ (2001), p. 2.

in the economy as implemented by the Nazi regime.⁶⁴ That said, in the 1960s an SDP Government shifted the German welfare state more towards the Beveridge model.⁶⁵ France applied a “nearly identical approach” to Germany during the 19th century. However, following the war France pursued a policy of ensuring social security to all citizens. This system finally synthesised the old French insurance protection (more akin to a Bismarkian contributory system) with Beveridgean universal protection.⁶⁶ Italy also moved towards a more comprehensive system of social protection after the second world war. Italy could not adopt its own comprehensive Beveridge-style plan, given the large-scale expense involved. However, social protection was extended into ever increasing areas, and by the 1960s the Italian welfare state looked similar to those already implemented in Northern Europe.⁶⁷ In conclusion, the welfare states of Europe during the 1950s and 1960s were structurally similar and tended to be based around the Bismarck model of employment-based and corporatist welfare or the Beveridge universalist approach.⁶⁸

Embedded liberalism therefore represented a paradigm shift in the relationship between labour and markets, insofar as it asserted that global markets were to be embedded into domestic social policies, which would govern the protection of workers. There was a stark shift away from supply-side *laissez-faire* capitalism, and towards demand-side Keynesian economic policies that prioritised stronger regulation and more limited capital and labour movements.⁶⁹ This led to the hegemony of the SER and the formation of modern welfare systems. This is an example of how not just labour market regulation changed, but also the “ideas, rules, and institutional structures” surrounding the economy. It is little coincidence that around the same time the International Labour Organisation (ILO) was declaring that labour was “not a commodity”.⁷⁰ Overall, the post-war period demonstrates globally a stronger commitment to protecting workers from over-commodification and exploitation.⁷¹

4 THE DE-STANDARDISATION OF EMPLOYMENT

Since the period of embedded liberalism, there have been significant changes to labour markets. These changes to the economic and political situation in Europe have meant that the original bargain of embedded liberalism has broken down.⁷² The 1970s saw a period of economic instability which brought around a period of high-inflation and rising

⁶⁴ See, for example, **T. Beck and H. Kotz**, *Ordoliberalism: A German oddity?* (2017) Centre for Economic Policy Research: London.

⁶⁵ L. Leisering (n 63), p. 2. It should be noted that this refers exclusively to the West German Federal Republic, rather than the German Democratic Republic.

⁶⁶ F. Bottini (n 25), p. 656.

⁶⁷ M Troilio, ‘The Welfare State After the Second World War: A comparison between Italy and Canada (1945 – 2013)’, pp. 408 - 409.

⁶⁸ S. Giubboni (n 59), p. 162.

⁶⁹ See, for example, J.M. Keynes, *The General Theory of Employment, Interest and Money* (1936).

⁷⁰ Article 1(a), ILO Declaration of Philadelphia, Declaration concerning the aims and purposes of the International Labour Organisation.

⁷¹ J. M. Keynes (n 69); M. Blythe (n 46); see also P. Arestis and M. Sawyer (n 56).

⁷² M. Ferrera, ‘Modest Beginnings, Timid Progresses: What’s next for Social Europe?’, in B. Cantillon, H. Verschuere, & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012) Intersentia: Cambridge, p. 21.

unemployment.⁷³ It is claimed that the Keynesian goals of full employment, fixed labour markets, and significant incremental wage increases pushed by strong trade unions resulted in labour having an increasingly strong position *vis-a-vis* capital, resulting in high inflation and diminished corporate profits.⁷⁴ This stagnation led to new ways of organising production, work, and economic activities, that were based on the neoliberal principles of flexible specialisation and vertical disintegration.⁷⁵ These gradually began to replace the orthodoxy based around the SER that existed during the post-war era of embedded liberalism, and heralded in the period of de-industrialisation and emergence of the post-industrial society.⁷⁶

4.1 Shifting Consensus: From 'Embedded' to 'Neo' Liberalism

The break-down of embedded liberalism resulted in a shift towards more *laissez-faire* principles, commonly referred to today as 'neoliberalism'.⁷⁷ In essence, neoliberalism represents a shift away from fixed, tightly regulated labour markets based on full-employment and generous welfare entitlement, towards flexible, competitive labour markets that prioritise controlling inflation over full-employment and the introduction of "work-inducing" welfare policies.⁷⁸ In many respects neoliberalism can be understood as the polar opposite to Keynesianism: whilst the latter focuses on demand-side economics, full-employment, strong trade unions, and fixed labour markets, the former focuses on supply-side economics, with the aim of full employment replaced by inflation stability, as well as reduced wage rates and labour costs, flexible labour markets that facilitate the hiring and firing of workers, diminished trade union power, and stricter welfare systems with reduced public spending.⁷⁹

Neoliberalism is suggested to be the product of the 'Mont Pelerin Society', a group of eminent liberal scholars, such as Hayek, Popper, and von Mises.⁸⁰ Unlike Bretton Woods and the post-war consensus, there was no 'master plan' to implement neoliberalism. The Mont Pelerin Society were long-term critics of Keynesian ideas and embedded liberalism,⁸¹ however, their ideas only found traction once Keynesianism started to falter. As Milton Friedman famously stated, when a crisis occurs, "the actions that are taken depend on the ideas that are lying

⁷³ G. Therborn, 'The Tide and Turn of the Marxian Dialectic of European Capitalism', in A. Wirsching (Eds), 'The 1970s and 1980s as a Turning Point in European History?' (2011), p.8-26; see also F. Hayek, 'Inflation Resulting from the Downward Inflexibility of Wages' (1958), pp. 295-299; F. Hayek, *The Constitution of Liberty* (1960).

⁷⁴ M. Kalecki, 'Political Aspects of Full Employment' (1943) 14(3) *Political Quarterly* 322; M. Blyth (n 46); G. Standing (n 47).

⁷⁵ A. Thornquist, 'False Self-employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market' (2015), p. 415.

⁷⁶ J. Cremers, (n 47).

⁷⁷ See, amongst others, J. Ostry, P. Loungani and D. Furceri, 'Neoliberalism Oversold?' (2016); G. Standing (n 47); D. Harvey (n 47); D. Harvey *Marx, Capital and the Madness of Economic Reason* (2017).

⁷⁸ See, amongst others, F. Handler, 'Activation Policies and the European Social Model' in A. Serrano Pascual and M. Jepsen (Eds) *Unwrapping the European Social Model* (2006); G. Alberti, 'The Government of Migration through Workfare in the UK: Towards a shrinking Space of Mobility and Social Rights?'; C. O'Brien, 'The ECJ sacrifices EU citizenship in vain: Commission v. United Kingdom' (2017).

⁷⁹ See, for example, F. Hayek 'Unions, Inflation and Profits' (1959); see also A. Thornquist (n 75).

⁸⁰ N. Shaxson, *The Global Finance Curse: How Global Finance is making us all poorer* (2018); G. Standing (n 47).

⁸¹ See, for example, F. Hayek, *The Road to Serfdom* (1944) ; F. Hayek, *The Constitution of Liberty* (1960) ; M. Friedman, *Capitalism and Freedom* (1962); M. Friedman, 'Inflation and Unemployment: Nobel Lecture' (1977); G. Stigler, 'Information in the Labor Market' (1962).

around taken during a crisis depend on the ideas lying around at the time”.⁸² Neoliberalism came to the fore following the elections of US President Ronald Reagan and UK Prime Minister Margaret Thatcher, as the latter in particular sought to combine Hayek’s free-market philosophy with a “revival of Victorian values”, famously telling her ministers that Hayek’s ‘A Constitution of Liberty’ was “what they now believed”.⁸³ This ultimately resulting in a paradigm shift towards a new economic consensus, with ‘third way’ Social Democratic politicians such as UK Prime Minister Tony Blair and German Chancellor Gerhard Schröder adopting similar economic policies, albeit with more focus on redistributive policies and funding public services. Neoliberal doctrine is now claimed to be hegemonic in global institutions, with the IMF, World Bank, and OECD, all being accused of focussing entirely on neoliberal doctrine, i.e., export-led industrialisation, reduced welfare spending, encouraging privatisation of public services, reduced government spending, reducing public sector salaries and public service costs, and the strict enforcing of private property rights.⁸⁴ Even the EU’s internal market, once an “ambitious project of macroeconomic integration” is now suggested to be “a wave of privatisation and deregulation”.⁸⁵ Nowadays, neoliberalism acts as a catch-all linguistic tool to describe modern liberal supply-based economics, similar to that of ‘Keynesianism’ in the post-war era. It is often used to describe any liberal-minded economic policy, that has the danger of rendering the term meaningless. However, for the purposes of this thesis, it can be said that the shift towards neoliberalism has had two major effects on employment and the regulation of labour markets: namely, (i) a shift away from the SER towards more flexible forms of employment, and (ii) the introduction of activating welfare policies and the discourse of responsibility. These will now be explained in turn.

4.2 Flexible (i.e., de-standardised) Employment

One of the main priorities of neoliberalism was to create more flexibility in the labour market, which essentially means creating new possibilities for employment outside of the SER, and reducing employment protections and labour costs relating to wages, employment protections, hiring and firing costs, etc. Neoliberalism considers that excessive regulation results in higher wages and labour costs, and adversely affects hiring and firing decisions.⁸⁶ Consequently, greater labour market flexibility allows for wages to ‘adjust rapidly’ to economic conditions.⁸⁷ In particular, the SER was argued to encourage labour market dualizations, the process whereby those not in a position to obtain an SER contract are more likely to be unemployed and in poverty.⁸⁸ Replacing it with flexible employment was argued

⁸² <https://www.goodreads.com/quotes/110844-only-a-crisis---actual-or-perceived---produces-real>

⁸³ See S. Metcalf, ‘Neoliberalism: The Idea that Swallowed the World’ (18th August 2017) The Guardian Online.

⁸⁴ *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (2016), p. 42; J. Cremers, ‘Non-standard employment relations or the erosion of workers’ rights’ (2010).

⁸⁵ J. Cremers, (n 47).

⁸⁶ L. Fanti, and P. Manfredi, ‘Is Labour Market Flexibility Desirable or Harmful? A Further Dynamic Perspective’ (2010).

⁸⁷ Ibid.

⁸⁸ K. Stone & H. Authurs, ‘The Transformation of Employment Regimes: A Worldwide Challenge’, in K. Stone & H. Authurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (2013) New York, Russel Sage; see also A. Koukiadaki & I. Katsaroumpas (n 52), p. 20.

to foster employment growth, boost long-term economic prosperity generally,⁸⁹ and ensure a return to steady growth following downturns in the business cycle.⁹⁰ Flexible labour markets are associated with improved productivity as there are more fluid labour market transitions and greater economic efficiencies.⁹¹ They are suggested to be beneficial for workers as flexibility facilitates more frequent transitions in and out of employment for less qualified and low-income workers, particularly more vulnerable and marginalised groups such as women and the young.⁹² This is suggested to ensure stable levels of employment in the long-term, whilst ensuring that the benefits of labour market flexibility are “broadly shared across society”.⁹³

The problem is that the benefits of labour market flexibility are at best elusive and are not shared broadly across society. Labour market flexibility has resulted in shifting the balance of power in the labour market away from workers and towards employers.⁹⁴ Unsurprisingly, diminishing the power of labour and removing the social protections of workers does not benefit them, and in fact is disproportionately damaging to those in the most low-wage and flexible types of employment. OECD research suggested that labour market flexibility immediately results in more firing, with the positive effects on hiring rates materialising more slowly, which can result in an overall reduction in employment.⁹⁵ Labour market flexibility tends to result in a gradual replacement of SER positions with flexible ones: for example, full-time replaced by part-time workers or temporary staff replacing permanent staff. This adversely affects job quality and results in higher rates of unemployment.⁹⁶ Moreover, any benefits deriving from labour market flexibility are not spread equally throughout society, with lower-income workers disproportionately affected by labour market flexibilization.⁹⁷ In fact, already by 2006 the European Commission had recognised that the flexibilization of employment has aggravated labour market segmentation and reduced the job security of the most vulnerable and disadvantaged workers in society.⁹⁸ In particular, it risks the situations whereby workers are trapped in “a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position”.⁹⁹ In general labour market flexibility has not been of much benefit to workers, and indeed has even potentially been damaging to those in lower-wage positions.

⁸⁹ H. Berger, and S. Danninger, ‘Labor and Product Market Deregulation: Partial, Sequential, or Simultaneous Reform?’ (2005), p. 4.

⁹⁰ J. Stiglitz et al, *Stability with Growth: Macroeconomics, Liberalization and Development* (2006); I. Antonaki, *Privatisations and Golden Shares: Bridging the gap between the State and the market in the area of free movement of capital in the EU* (2019) Leiden: E.M. Meijers Institut.

⁹¹ B. Cournede, ‘Enhancing Economic Flexibility: What is in it for workers?’ (2016), p. 5.

⁹² Ibid.

⁹³ Ibid; See also H. Berger and S. Danninger, ‘Labor and Product Market Deregulation: Partial, Sequential, or Simultaneous Reform?’, p. 7; B. Cournede (n 91), p. 8.

⁹⁴ A. Thornquist (n 75), p. 415.

⁹⁵ B. Cournede (n 91), p. 5.

⁹⁶ Ibid.

⁹⁷ J. Cremers, (n 47).

⁹⁸ European Commission Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century (2006) COM 708 fina.

⁹⁹ Ibid.

4.3 Activating Labour Market Policies

Neoliberalism has also resulted in a change in approach towards the welfare state. It seeks to strip away many of the protections that were permitted, and occasionally nurtured, under the system of embedded liberalism, including institutions such as the welfare state.¹⁰⁰ Concretely, this means replacing the more universalist welfare policies of embedded liberalism with the mantra that work is the best form (and should be only form) of welfare.¹⁰¹ What this means in practice is that individuals should not spend prolonged periods outside of employment whilst in receipt of welfare benefits, especially those relating to unemployment, and should be 'encouraged' back into employment through a series of 'activating' policies aimed at punishing those that do not adequately reintroduce themselves into the labour market.¹⁰²

It should be noted that certain activating labour market policies are logical: it is certainly not an unreasonable request to expect a jobseeker to write a CV, submit job applications, or attend interviews if they expect to receive state support for jobseekers. That said, other requirements go too far, however, such as a requirement to accept *any* job, even below one's skill grade or an unpaid role, in order to gain skills and employability or to attend weekly consultations which cannot be cancelled and failure to attend can result in the individual losing benefit entitlement. Whilst such measures are formally aimed at eliminating poverty through increased employment, there is a cost-cutting rationale behind them, and an ideological crusade to 'end welfare dependency',¹⁰³ often seen as the 'bogeyman' by adherents of neoliberalism, despite the concrete negative effects of welfare dependency being (at best) extremely difficult to find. It should be noted that not all European states have adopted activating labour market policies. Whilst certain liberal market economies, such as the UK and the Netherlands, have enthusiastically embraced activating labour market policies, other countries, in particular those in Scandinavia, still retain much of the Keynesian labour market policies of the era of embedded liberalism.¹⁰⁴

Activating labour market policies are often associated with the 'personal responsibility system' of welfare, that is highly reminiscent of the *laissez-faire* approach, insofar as it sees the labour market as inherently meritocratic and employment as the sole route out of poverty.¹⁰⁵ As such, if an individual does not find work, then it is their own fault for failing to utilise the meritocratic powers of the market. In other words, those who cannot work are deemed irresponsible, and any lack of social protection is the result of the individual's actions.¹⁰⁶ This approach risks commodifying the individual, as they become more reliant on the market for their survival. Activating labour market policies are suggested to be a core part of neoliberalism, and it is argued that that labour market flexibility should be combined with

¹⁰⁰ D. Harvey (n 47), pp. 160, 169.

¹⁰¹ S. Wright, 'Relinquishing Rights? The Impact of Activation on Citizenship for Lone Parents in the UK', in S. Betzelt, S. Bothfeld (eds), *Activation and Labour Market Reforms in Europe. Work and Welfare in Europe* (2011), Palgrave Macmillan: London, p. 57.

¹⁰² C. O'Brien (n 9), p. 1647; D. Carter, 'Inclusion and Exclusion in the EU', in M. Jesse (ed.), *European Societies, Migration, and the Law: The Others Amongst Us* (2020), CUP: Cambridge, p. 303; M. Ferrera, 'The European Union and National Welfare States, Friends, not Foes: But What Kind of Friendship? *URGE Working Paper* 4/2005.

¹⁰³ S. Wright (n 101), p. 57.

¹⁰⁴ G. Esping-Andersen, *Social Foundations of Post-industrial Economies* (1999) OUP: Oxford.

¹⁰⁵ D. Harvey (n 47), p. 168.

¹⁰⁶ C. O'Brien (n 102), p. 1672.

programmes such as active labour market (re-) introduction programmes in order to feel its full effects.¹⁰⁷ However, like labour market flexibility, activating labour market policies and the responsibility model of welfare have come under harsh criticism in recent years. They are suggested to fail in providing adequate social protection to individuals through policies of redistribution, instead providing the bare minimum in order to force people back into labour market.¹⁰⁸ Moreover, the strict conditionality associated with activating policies means that those not meeting such conditions are likely to be pushed into poverty and social exclusion.¹⁰⁹ It ignores the chaotic and random reality of daily life, and punishes people for reacting to external factors, such as redundancy, illness, bereavement, etc.¹¹⁰ The actual lives of individuals becomes subsidiary to economic and employment policies, in particular cutting public spending.¹¹¹ This arguably affects the moral foundations of European welfare states, in terms of what is considered to be a fair social minimum.¹¹² This creates a situation similar to the workhouses of Victorian England, whereby poverty becomes an integral part of the system, pushing people to accept ever-worse working conditions in order to avoid falling into deprivation and poverty. State support is kept intentionally low, in order to ensure that people's lives are not overly good, thereby using poverty as a labour market tool. Worst of all, such labour market policies are justified on the basis of a non-existent problem: research indicates that the section of society which is able to actively work but chooses not to do so is insignificantly small and has no real bearing on public finances.¹¹³

5 LABOUR MARKETS FOLLOWING THE GLOBAL FINANCIAL CRISIS

Despite being described as the 1929 moment of our generation, the 2008 Global Financial Crisis has not yet resulted in a radical shift in economic discourse and policy around labour market regulation like Bretton Woods. In fact, at least initially, the primary response was a doubling down on neoliberal approaches towards labour markets and welfare entitlement, specifically reducing labour costs and wage-rates and increasing labour market flexibility, as a means of achieving a more competitive economy.¹¹⁴ These changes to employment relations, particularly working schedules, and an increase of non-standard positions as an alternative to mass unemployment has occurred in many European countries.¹¹⁵ This was a particular problem in Eurozone Member States, as they were unable to rely on the traditional tool of currency devaluations to regain competitiveness. Instead, they had to implement 'internal devaluations', which primarily involve reducing labour and social costs in order to secure

¹⁰⁷ B. Courneade, 'Enhancing Economic Flexibility: What is in it for workers?' (2016).

¹⁰⁸ C. O'Brien (n 102), p. 1674.

¹⁰⁹ D. Ashiagbor, 'Promoting Precariousness? The Response of EU Employment Policies to Precarious Work', in J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (2006) Oxford: Hart.

¹¹⁰ S. Wright, 'Welfare-to-work, Agency and Personal Responsibility' (2012) 41(2) *Journal Social Policy* 309, 322.

¹¹¹ C. O'Brien (n 102), p. 1672.

¹¹² Ibid, p. 1676; see also K. Nelson, 'Social assistance and EU poverty thresholds 1990–2008. Are European welfare systems providing just and fair protection' (2013), 29 *European Sociological Review* 387.

¹¹³ S. Wright (n 110), p. 321.

¹¹⁴ J. Cremers, (n 47).

¹¹⁵ International Labour Office, *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016); OECD, *In It Together: why Less Inequality Benefits All* (2015); P. Schoukens & A. Barrio (n 51); A. Bogg, 'The regulation of working time in Europe', in A. Bogg, C. Costello & A.C.L. Davies *Research Handbook on EU Labour Law* (2016: Edward Elgard Publishing), p. 287.

public finances and regain competitiveness.¹¹⁶ In particular, Member States that required financial assistance through the European Financial Stability Facility (EFSF) and subsequently the European Stability Mechanism (ESM) were subject to strict conditionality in the form of severe internal devaluations that seek to reduce labour costs, making these economies more competitive on the European and world stages.¹¹⁷

Member States have used the financial crisis to make changes to national labour law that resulted in shorter working time and increased flexibility that have encouraged the use of non-standard employment relations more generally.¹¹⁸ Whilst this is a common trait in neoliberal labour markets, since the crisis this has been extended into sectors where it was not previously common, such as in professional roles.¹¹⁹ This results in maximising both flexibility for employers as well as their power and control over workers.¹²⁰ This has resulted in ever-increasing levels of increasingly flexible forms of employment marginal part-time, zero-hour, and on-demand contract work,¹²¹ the use of false self-employment,¹²² and fixed-term work, many of which were actually in decline before the Crisis.¹²³

Another important development during this period that has contributed to the increase in precarious employment has been the rise of the platform economy. Technological advancement has always been a significant driver in developing labour markets, as they tend to disrupt pre-existing forms of regulation.¹²⁴ In the 21st century, the 'big data' revolution has led to an unprecedented level of technological breakthroughs, which occur in every sector and at every level, thereby "blurring the lines between the physical, digital and biological spheres".¹²⁵ In particular, this has resulted in the establishment of the platform economy, which has created new forms of employment, often relating to delivery services. Notable examples include companies such as *Uber* and *Deliveroo*, as well as other delivery and passenger hire services that have been the subject of litigation in recent years given that their employment status is far from clear.¹²⁶ The challenges relating to big data and artificial

¹¹⁶ S. Deakin, 'Regulatory Competition in Europe after Laval' (2008) *Centre for Business Research Working Paper No 364*, University of Cambridge, p. 6.

¹¹⁷ K. Armingeon and L. Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012); M. Ronzoni, 'How Social Democrats may become reluctant radicals: Thomas Piketty's Capital and Wolfgang Streeck's Buying Time' (2018); T. Tresselt et al, *Adjustment in Euro Area Deficit Countries: Progress, Challenges, and Policies* (2014).

¹¹⁸ M. Blyth, 'The Austerity Battle: Why a Bad Idea won over the West' (2013); W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014).

¹¹⁹ A. Bogg (n 115), p. 288.

¹²⁰ *Ibid*, p. 276.

¹²¹ A. Broughton et al (DG Internal Policies, European Parliament), *Precarious Employment in Europe* (2016) DG for Internal Policies (European Parliament): Brussels, p. 69; P. M. Cardoso et al, 'Precarious Employment in Europe' (2014). In the UK, where zero-hour contracts are legal, these have risen over the last 10 years from 20,000 to over 1,000,000.

¹²² For example, see European Commission Staff Working Document, 'Country Report The Netherlands 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019) SWD (2019) 1018 final; see also European Commission Staff Working Document, 'Country Report The United Kingdom 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (27th February 2019) SWD(2019) 1027 final.

¹²³ S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, p. 18.

¹²⁴ See G. Standing (n 47).

¹²⁵ K. Schwab, 'The Fourth Industrial Revolution: What it means, how to respond to it' (14th January 2016).

¹²⁶ A. Pesole et al, 'Platform Workers in Europe: Evidence from the COLLEEM Survey' (2018).

intelligence are likely to accelerate these changes significantly, and even create new ones.¹²⁷ While not directly related to the Global Financial Crisis, the platform economy does not exist in a vacuum, and the new and potentially exploitative employment relations adopted by companies operating in this area are at least in part the consequence of the employment flexibility fostered under neoliberalism.

The period since the Global Financial Crisis has not seen a shift back in favour of workers over the market. In fact, if anything it has shifted further the other way, from a system designed to ensure fair competition amongst actors, towards one based on ensuring a state's competitiveness *vis-à-vis* other states. This required forcing down the cost of labour to make it more competitive, as well as reducing welfare spending even further. When combined with new forms of employment made possible by technological innovation, has resulted in something of a perfect storm that is pushing employment towards precariousness.

At the time of writing this thesis, it is unclear what effect the Covid-19 pandemic, or more recently the inflation crisis, will have on labour markets and employment norms in Europe. Despite certain measures being adopted during the pandemic that protected individuals' employment and earnings, it is uncertain whether it will act as a long-term catalyst for a more protective system of social protection and secure employment. That said, global institutions such as the IMF have begun to question whether the negative consequences associated with neoliberal responses for workers actually outweigh the benefits for employers.¹²⁸ Furthermore, during the pandemic many previously sacrosanct fiscal rules were jettisoned to support workers such as the Growth and Stability Pact. There was also much discussion over the importance of key sector workers, who are often engaged in the most precarious of situations and make up the subject matter of this thesis. That being said, it is also possible that the Union and its Member States will reach for the neoliberal playbook when forming their responses: more flexibility, more conditionality, and more austerity.

6 THE TRAITS OF PRECARIOUSNESS

The shift towards neoliberalism, combined with the financial crisis and the rise of the platform economy, meant that there were increasing levels of non-standard employment, such as part-time work, fixed-term work, agency work, etc. However, not all non-standard work should be considered as precarious, making the task of defining precarious employment very difficult.¹²⁹ This is particularly the case in the European Union, which has not explicitly discussed work precariousness until very recently.¹³⁰

¹²⁷ J. Johanessen, *The Workplace of the Future: The Fourth Industrial Revolution, The Precariat and the Death of Hierarchies* (2019) Routledge: Abingdon.

¹²⁸ J. Ostry, P. Loungani and D. Furceri, 'Neoliberalism Oversold?' (2016); B. Cournede, 'Enhancing Economic Flexibility: What is in it for workers?' (2016); OECD, *In It Together: why Less Inequality Benefits All* (2015).

¹²⁹ U. Oberg, 'Precarious Work and European Union Law' (2016) Grant VP/2014/0554, p. 9.

¹³⁰ The obligation to prevent precarious working conditions is now contained in Article 5 of the European Pillar of Social Rights.

The ILO defines precarious employment as that in which “employment security, which is considered one of the principal elements of the labour contract, is lacking”.¹³¹ This insecurity can come in the form of job stability, working conditions, uncertainty in terms of continuing employment; control over labour processes; the nature and stability of income and access to social protection, etc.¹³² However, solely using insecurity is inappropriate when determining whether employment is precarious. ‘Insecurity’ can be found in many SER positions, at least in certain sectors.¹³³ Furthermore, it cannot be equated with non-standard employment. Whilst non-standard work is more insecure than SER work in general, by using the SER as the benchmark it suggests that *any* deviation from the strict SER is problematic.¹³⁴ This is not the case, as certain types of non-standard work, in particular part-time work and self-employment, are often reported in highly positive terms.¹³⁵ For these persons, the ‘insecurity’ associated with non-standard employment is actually perceived as increased flexibility or independence, which workers often see as desirable as it provides greater individual autonomy, a more sustainable work-life balance, or more free time.¹³⁶ As such, it is difficult to know whether precarious employment should be defined as sectors within the labour market, sub-sections of non-standard work, or something beyond this entirely.¹³⁷

Precarious employment can therefore be understood as forms of non-standard employment that are characterised by even greater insecurity.¹³⁸ Furthermore, the voluntary nature of this employment insecurity is very important. The EPSC highlights this point by defining precarious employment as the situation whereby “more job seekers are *forced* into short-term contracts, part-time work or other forms of labour *which they see as undesirable*” (emphasised added).¹³⁹ This suggests that undesirable or forced insecurity is key to determining whether employment is precarious. If the worker is pushed by economic forces into an insecure, non-standard position, when they would prefer more security in terms of employment protections, longer hours, or a more secure status, then their employment is more likely to be characterised as precarious employment. It also demonstrates the high power-imbalance between employee and employer in these situations, another characteristic of precarious employment, as employers can push individuals into a less-than-desirable working situation.¹⁴⁰

¹³¹ Policies and Regulations to Combat Precarious Employment (2011), ILO Catalogue. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_164286.pdf; see also P.M. Cardoso (n 121); A. Broughton (n 121), p. 7.

¹³² J. Fudge & R. Owens, ‘Precarious Work, Women, and the New Economy: The Challenge to Legal Norms’, in J. Fudge & R. Owens (eds), *Precarious Work, Women, and the New Economy* (2006) Hart Publishing: London, p. 12; G. Standing (n 51), p. 17.

¹³³ A. Koukiadaki & I. Katsaroumpas (n 52), p. 21.

¹³⁴ U. Oberg (n 129), p. 12; see also G. Rodgers, ‘Precarious Work in Western Europe: The States of the Debate’, in G. Rodgers and J. Rodgers, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (1989) Brussels: International Institute for Labour Studies, p. 3.

¹³⁵ EPSC Strategic Notes, *The Future of Work: Skills and Resilience for a World of Change*. Issue 13, 10th June 2016.

¹³⁶ Eurofound, ‘Flexible Forms of Work: very atypical contractual arrangements’ (2010). Available at <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements>

¹³⁷ N Kountouris, ‘The Legal Determinants of precariousness in personal work relations: A European Perspective’ (2012) *Comparative Labour Law & Policy Journal* 21, p. 24.

¹³⁸ See S. McKay et al (n 123); A. Broughton (n 121); A. Koukiadaki & I. Katsaroumpas (n 52); U. Oberg (n 129).

¹³⁹ EPSC Strategic Notes, *The Future of Work: Skills and Resilience for a World of Change*. Issue 13, 10th June 2016.

¹⁴⁰ V. Porthe et al, ‘Extending a Model of Precarious Employment: The case of Spain’ (2010) 53(4) *American Journal of Industrial Medicine*; C. Thornquist, ‘Welfare States and the Need for Social Protection of Self-Employed Migrant

These two characteristics are inherently connected: the power imbalance often means that the employer can reduce the worker's security by easily altering an employee's rights and status, terminating their contact, changing their schedule and job tasks, or not providing them with a formal employment contract.¹⁴¹ Other characteristics include the close monitoring and assessment of individual tasks, resulting in sanctions or dismissal for those not abiding by the demands of the employer, which are often excessively strict.¹⁴² Job tasks also become commodified, with increasing amounts of 'pay-per-job' roles, which often involve increasing amounts of non-waged tasks and fewer non-cash benefits.¹⁴³ Their marginal status also means they have less trade union representation, or are even excluded from this, thereby limiting their ability to improve their employment situation independently.¹⁴⁴ They are often unable to enforce employment rights, meaning they run the risk of being subject to unsafe working conditions, as well as insufficient income to support oneself following a period of employment.¹⁴⁵ The difficulty in regulating employment and the promotion of non-standard work is actually suggested to be normalising and even actively encouraging the characteristics of precarious employment.¹⁴⁶ Another consequence of precarious employment is that it creates dualizations in the labour market, whereby workers are engaged on differing contracts, despite sometimes performing exactly the same role, and therefore obtain different rights and protections.¹⁴⁷ There is an irony given that non-standard work was claimed to mitigate the problems of dualizations between workers in SERs and non-SERs, but has instead just created its own. In fact, increasingly employers seek to actively exploit legal loopholes such as labour market dualizations, to undermine social protection in order to minimise labour costs.¹⁴⁸ The above suggests a regression towards a form of casual and exploitative employment that is reminiscent of the pre-SER, or even arguably pre-capitalist, forms of exploitation.¹⁴⁹

The insecurity associated with precarious employment does not just affect workers in employment, but also has wider consequences for life in general, insofar as it can lead to social vulnerability in general.¹⁵⁰ Most pertinently, it is suggested to increase the risk of unemployment or in-work poverty, as well as poor mental and physical health.¹⁵¹

Workers in the European Union' (2015) 34(4) *International Journal of Comparative Labour Law and Industrial Relations* 391, p. 395.

¹⁴¹ D. Tucker, 'Precarious Non-standard employment: A review of the literature' (2002); see also P.M. Cardoso (n 121); A. Broughton (n 121), p. 9.

¹⁴² S. Ovotrup, and A. Prieur, 'The commodification of the personal: labour market demands in the era of neoliberal post-industrialization' (2016).

¹⁴³ G. Standing (n 51).

¹⁴⁴ U. Oberg (n 129), p. 11.

¹⁴⁵ S. McKay, 'Disturbing equilibrium and transferring risk: confronting precarious work', in N. Countoris & M. Freedland (eds.) *Resocialising Europe in a Time of Crisis* (2013) CUP: Cambridge, p. 199; see also S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London, and U. Oberg (n 129), p. 10.

¹⁴⁶ A. Koukiadaki & I. Katsaroumpas (n 52), pp. 27-28.

¹⁴⁷ See S. McKay et al, 'Study on Precarious work and social rights' (2012) Working Live Research Institute: London.

¹⁴⁸ G. Standing (n 51).

¹⁴⁹ A. Thornquist (n 75).

¹⁵⁰ G. Rodgers, 'Precarious Work in Western Europe: The States of the Debate', in G. Rodgers and J. Rodgers, *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (1989) Brussels: International Institute for Labour Studies, p. 3.

¹⁵¹ D. Ashiagbor (n 109), p. 80.

Furthermore, the strict conditionality and poverty-traps associated with 'activating' labour market policies reduce an employee's ability to refuse requests and also put them at risk of social exclusion.¹⁵² This is particularly the case for migrant workers, who must consider their legal status and rights as migrants (i.e. their residence status and potential equal treatment rights), as well as their position on the labour market.

Research conducted for European institutions tends to equate precarious and non-standard employment, and separates precarious employment into categories such as part-time work, fixed-term work, employment agency work, independent contractor status and the false self-employed, posted work, non-remunerated work, etc.¹⁵³ This approach is lacking, however, as precarious employment should be classified on the basis of the attributes of a particular non-standard position, rather than general categories of non-standard work.¹⁵⁴ Therefore, such forms of non-standard employment should only be classified as precarious if they contain a degree of involuntary insecurity and provide the employer with a high degree of power over the worker.

For example, this can occur when the worker has limited job or income security due to the limited nature of their employment. Whilst part-time work can allow a worker to spend more time with family and enjoy a better work/life balance, when this is precarious it does not guarantee them a sufficient number of hours and/or remuneration. This is a problem for part-time workers performing very few hours, as well as on-demand workers such as those on zero-hour contracts or engaged in platform work. Another example is where the individual is engaged on a short-term or temporary basis which undermines their employment security. This refers to the security a worker has during periods of economic inactivity. Short-term and temporary positions become the norm, rather than the exception. These positions can provide a worker with valuable work experience than might otherwise be unavailable, however, increasingly workers are trapped into never-ending cycle of temporary positions, with limited support from the state due to the strict conditionality of neoliberal welfare systems. Finally, a recent phenomenon is the problem of false or bogus self-employment. This is where an individual is engaged on a self-employed basis, thereby taking on much of the risks associated with employment but having few of the rewards traditionally associated with being one's own boss. Their (mis-)classification as self-employed persons means that they take greater risks and have employment and social protections.¹⁵⁵

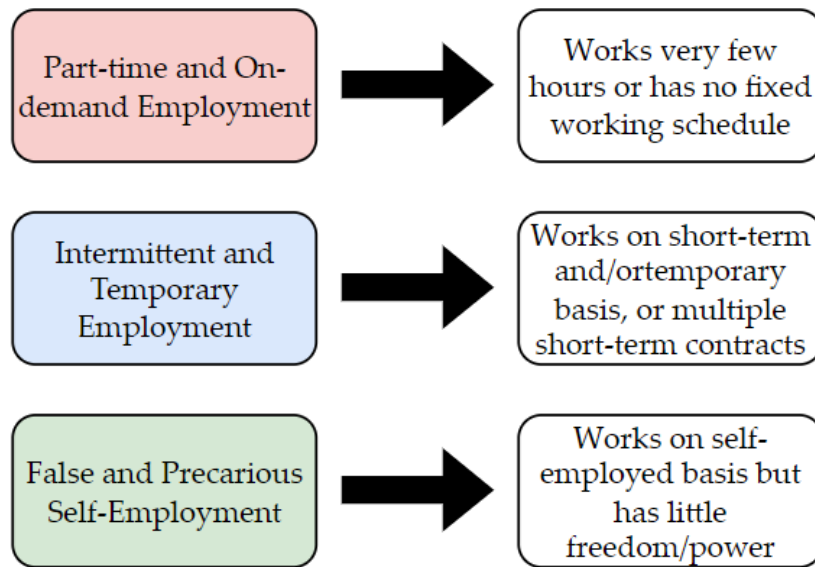
¹⁵² I. Greer, 'Welfare reform, precarity and the re-commodification of labour' (2016).

¹⁵³ See S. McKay et al (n 123); A. Broughton (n 121); A. Koukiadaki & I. Katsaroumpas (n 52); U. Oberg (n 129).

¹⁵⁴ Internal Labour Organisation (n 115), p.18.

¹⁵⁵ See, for example, P. Schoukens & A. Barrio (n 51), p. 317.

Figure 1: The Main Types of Precarious Employment



7 CONCLUSION

From the beginning of industrialisation and the formation of modern labour markets, the protection available to workers has been dominated by the existential question of whether labour should be treated as a commodity ‘like any other’, and the extent to which it can be separated from the worker that performs it. This has resulted in the level of protection available shifting over time as political and economic priorities also change. During the era of industrialisation, *laissez-faire* economics resulted in a high degree of worker commodification, with few social protections provided by the state, which is argued to have laid out the conditions for the Great Depression and the rise of fascism in Europe in the 1930s. As a response to this, the *laissez-faire* approach was firmly rejected at the Bretton Woods conference in favour of ‘embedded liberalism’, which ensured that global markets were embedded into social policies decided at the national level. In terms of labour markets, this ‘embedded liberalism’ was based on the ‘standard’ employment relationship (the SER) and the modern welfare state, both of which resulted in greater worker protections than existed previously, as well as a period of significant economic growth and rising living standards.

In the 1970s, however, economic stagnation crept into the system of embedded liberalism. The result was a gradual shift away from the idea of embedding global markets into domestic systems in favour of greater liberalism and free trade, which is now commonly known as neoliberalism. In the context of labour markets, neoliberalism resulted in a departure from the SER towards flexible forms of employment such as part-time and fixed-term work, and a shift towards stricter, more conditional welfare systems based on reducing public expenditure and encouraging individuals into the labour market through activating policies. Instead of resulting in a change in the protection afforded to workers, the Global Financial Crisis led to a doubling-down of neoliberal solutions to the crisis. This, when combined with the rise of platform work, has arguably increased the level of precarity in the labour market, by creating

new insecure forms of employment and made kinds of non-standard work precarious through their insecurity and by shifting more power in favour of employers.

This has resulted in the ongoing increase in precarious forms of employment, which can be understood as non-standard employment where the individual faces undesirable insecurity (as opposed to flexibility) and a high power-imbalance between employee and employer. The most notable forms of employment meeting this definition include (i) part-time with few hours and on-demand work such as zero-hour contracts and platform work; (ii) intermittent employment and in particular the repeated use of temporary contracts; and finally, (iii) the use of contracts of self-employment to push risks onto the worker, when they do not give them the benefits of such work and maintain a level of control over them.