Brexit
Special Supplement

Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels

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In the aftermath of the Brexit referendum of 23 June 2016, the question of migration has been at the forefront of attempts to understand what happened, and in particular why working class communities in many of the regions of England, and in parts of Wales, voted predominantly for the Leave side.[1] Polling data show a weak correlation between areas of the country that voted for Leave and high levels of inward migration from the rest of the EU. The link between immigration and Brexit is very clear in East Anglian agricultural towns like Boston and Wisbech,[2] but otherwise is weak. South Wales and the North East of England, which also saw clear majorities for Leave, are not areas of high EU migration. Instead, they are regions that have experienced successive waves of deindustrialisation since the 1980s.[3] The overriding issue raised by the Brexit vote, in my view, is not migration as such (although that is part of the story), but a wider phenomenon of deepening economic insecurity, and the dangerous political dynamic it has created.

Job losses and plant closures over many years, resulting in the casualisation of wages and working conditions, have led to disenchantment with the European project among sections of the UK population that might have been expected to support it, given the role of EU law in providing for a range of social rights that UK governments would almost certainly not

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[1] The large cities outside London, including Bristol, Manchester, Liverpool, Newcastle and Leeds voted for Remain, but Birmingham, Nottingham and Sheffield voted for Leave, as did many medium sized towns and traditionally working class regions in the north and midlands of England. *See EU Referendum: The Result in Maps and Charts*, BBC NEWS (June 24, 2016), *available at* http://www.bbc.com/news/uk-politics-36616028.

[2] 75% voted for Leave in Boston and 71% in Fenland (of which Wisbech forms a part), among the highest votes for Brexit. *See EU Referendum: Full Results and Analysis*, THE GUARDIAN (June 24, 2016), *available at* http://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis.

[3] Scotland has also undergone significant deindustrialisation in the same period, but protest against the policies of Westminster governments found an outlet in the rise of nationalism and the election to office of the predominantly social democratic Scottish National Party, which has held a controlling bloc of seats in the Scottish Parliament continuously since 2011. Every Scottish region voted by a majority for Remain and the overall vote in Scotland was over 60% for rejecting Brexit. *See EU Referendum: The Result in Maps and Charts*, BBC NEWS (June 24, 2016), *available at* http://www.bbc.com/news/uk-politics-36616028.

have conceded of their own accord.[4] In what way exactly did the EU institutions contribute to this process and what if anything can they do about it now?

In areas of the country where EU migration is high, in particular East Anglia, there is evidence of worsening labour conditions in sectors such as agriculture, which, until recently, provided a living wage and regular employment to tens of thousands of workers. Labour trafficking of the kind that has led to some high profile (but still rare) prosecutions of employers for breaches of forced labour legislation is partly to blame for this.[5]

Is EU law responsible for these developments? It is tempting to say that it is not, and that these developments are the result of the neoliberal policies pursued by successive UK governments. This is only partly true. Disentangling the role of the EU, on the one hand, and domestic governments, on the other hand, is important as it throws light on what is really at stake in the Brexit debate.

First, take the deindustrialisation that has led to the loss of secure industrial jobs, most recently in Teesside (following the closure of the Redcar steel plant) and South Wales (where the steel industry will shrink in the near future even if it does not completely disappear[6]). The suggestion has been made that EU state aid rules prevented the rescue of the Redcar plant and are impeding the salvaging of Tata Steel's UK operations. This is implausible: the EU Treaties allow for government support for industries in times of crisis and explicitly do not prohibit state ownership of enterprises.[7] A more plausible interpretation is that EU law has been used over many years as an excuse for inaction by UK governments opposed to the idea of an industrial strategy (while nevertheless being prepared to rescue the financial sector in 2008[8]).

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[4] Deakin and Morris provide an overview of the evolution of EU social policy from the perspective of its relationship to UK labour law. See SIMON DEAKIN & GILLIAN S. MORRIS, LABOUR LAW (6th ed., 2012), pp. 103-13.

[5] Felicity Lawrence, *The Gangsters on England's Doorstep*, THE GUARDIAN (May 11, 2016), *available at* https://www.theguardian.com/uk-news/2016/may/11/gangsters-on-our-doorstep.

[6] The House of Commons Library prepared a brief about the closure of the Redcar steel plant and the more recent threat to those elsewhere in the country in particular in South Wales. *See* Chris Rhodes, *The UK Steel Industry: Statistics and Policy, House of Commons Library Briefing Paper Number 07371* (May 2016), *available at* http://researchbriefings.files.parliament.uk/documents/CBP-7317/CBP-7317.pdf.

[7] *See, e.g.,* Article 345 TFEU.

[8] In 2008-9 the UK government had to provide financial support to several large banks, including the Royal Bank of Scotland (RBS) and HBOS, to avoid their insolvency. It continues to hold significant stakes in RBS and in Lloyds Bank, which bought HBOS at the height of the crisis.

Still, EU law is not blameless. The freedom EU law gives to enterprises to move across national borders ("freedom of establishment," along with the ancillary freedoms that operate in relation to cross-border movements of services and capital) increasingly translates into a right of business to seek out the least "restrictive" (or "protective" depending on your point of view) fiscal and regulatory regimes. This is the result in part of decisions of the Court, most notably the *Viking* and *Laval* judgments,[9] but it is a process that the Commission has also been actively encouraging since the debate over the Bolkestein Directive in the mid- 2000s.[10] That proposal ended up being watered down, but the idea that the construction of the internal market required a free for all in the rules governing free movement of enterprise only grew stronger over time.

Faced with this competitive challenge, some member states responded by strengthening their efforts to invest in skills and to encourage capital investment for the long-term. In varying degrees this is how Germany, the Nordic systems, France, and the low countries have retained a manufacturing base. The very high labour productivity they have achieved does not always translate into sustained employment growth, and has not prevented persistent and serious inequalities from emerging.[11] But their approach is very different from the path followed in the UK, which has been to tolerate the shrinking of the industrial base, while actively encouraging the growth of a casualised labour market, characterised by growing self-employment (often a front for very insecure employment), agency work, and zero hours contracting.[12] The result is the low-wage, low-productivity economy that the UK is rapidly becoming, and increasingly so since the crisis of 2008 revealed the structural weaknesses of the British economy.

To sum up this part of the argument, deindustrialisation is largely something that the UK has brought upon itself, but which EU rules have done nothing to prevent, and have probably, on balance, exacerbated.

Now consider the relative contributions of EU free movement laws and domestic UK social policy to the degradation of stable work and wages in large parts of the UK labour market.

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[9] Case C-348/05, *ITF* v. *Viking Line* [2007] ECR-I 10779; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & others [2007] ECR-I 11767.*

[10] It eventually became Directive 2006/123/EC. *See* Catherine Barnard, *Unravelling the Services Directive*, 45 COMMON MARKET LAW REVIEW 323-394 (2008).

[11] *See* S. Deakin & F. Wilkinson, *Marchés du travail, crise financière et réforme : projet d'agenda pour une politique du travail*, 182 L'HOMME ET LA SOCIETE 25-52 (2011).

[12] Adams and Deakin have written about the various ways in which labour market policy in Britain, together with social security and fiscal law in particular but also employment law, has contributed to casualisation of work. See Zoe Adams & Simon Deakin, REREGULATING ZERO HOURS CONTRACTS (Liverpool: Institute of Employment Rights, 2015).

The experience of falling wages and casualisation of work that is being experienced in parts of agriculture (for example, farming and food production in towns like Wisbech and Boston) and in the retail sector (for example, Sports Direct's warehouse in the Derbyshire town of Shirebrook[13] or Amazon's many distribution centres[14]) is associated with inward migration from other EU member states, but that is not the only cause.

The movement of labour into the UK is not spontaneous; it is organised along a chain of supply that links UK-based employers (many of them multinationals and/or listed companies) to labour market intermediaries including those operating across EU borders and taking advantage of the rules on freedom to supply services free of regulations applying in the host state, subject only to the minimal controls put in place by the Posting of Workers Directive. In its extreme form this supply chain morphs into labour trafficking of the kind which until recently was thought to exist only in developing countries.

The Posting Directive, as interpreted in *Laval* and later cases, is of course meant to prevent this, since statutory minimum wages and certain other basic legislative standards applying in the host state must be observed.[15] But there is an air of unreality about the subtle distinctions drawn in the posting jurisprudence, and a gulf separating what the law says should happen, and what is happening in practice. Once labour market intermediaries operating on a cross-border basis were exempted from the principle of the automatic territorial effect of labour standards in the host state, the door was open to the worst kinds of abuse, reminiscent of third world conditions, ranging from repeated non-payment of wages, widespread health and safety infractions, and, a growing incidence of forced labour of the kind which has led to prosecutions of gangmasters who were trafficking migrants from eastern Europe to work in farms in rural Cambridgeshire.[16] These prosecutions, while welcome, are most likely catching only a tiny proportion of labour

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[13] Simon Goodley & Jonathan Ashby, *A "Day at the Gulag": What it's Like to Work at Sports Direct's Warehouse*, THE GUARDIAN (December 9, 2015), *available at* https://www.theguardian.com/business/2015/dec/09/sports-direct-warehouse-work-conditions; House of Commons Business, Skills and Innovation Committee, Oral Evidence: Working Practices at Sports Direct, HC 219 (June 7, 2016), *available at* http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/parliament-2015/working-practices-at-sports-direct-inquiry-16-17/). Shirebook is the site of a former colliery and is in a region known, until the mid-1980s, for worker militancy. Shirebrook Colliery, along with most of the rest of the British coal industry, was closed following the unsuccessful (for the unions) outcome of the miners' strike of 1984-85.

[14] Carole Cadwallader, *My Week as an Amazon Insider*, THE OBSERVER (December 1, 2013), *available at* https://www.theguardian.com/technology/2013/dec/01/week-amazon-insider-feature-treatment-employees-work.

[15] Directive 96/71/EC. *See* DEAKIN & MORRIS, *supra* note 4, pp. 123-28.

[16] Lawrence, supra note 5.

abuses, and are unlikely to have persuaded anyone in Wisbech who had been thinking of voting Leave from changing their mind.

How did UK domestic social policy respond to the downward pressure on wages and terms and conditions arising from the *Laval* judgment? Not, as might have been supposed, by strengthening the floor of workers' rights in UK labour law. On the contrary, critical protections for agricultural workers were removed with the abolition of the Agricultural Wages Board for England and Wales in 2013.[17] The UK government helped to water down the Temporary Agency Work Directive prior to its adoption in 2008 and took advantage of the resulting derogations and loopholes when transposing it into national law in 2012.[18] Zero hours contracts have been tolerated subject only to a cosmetic law passed for reasons of political symbolism in 2015.[19]

This is the same approach to EU social policy that UK governments have been pursuing since the 1980s. The UK first diluted, then tried to block the Working Time Directive of 1994. Once it had no choice but to adopt the Directive, the UK took full advantage of the many derogations it contained, including the right of an individual worker to waive their right to a maximum working week of 48 hours.[20]

It is true that EU law provides many social protections that the UK legislature would most likely not have adopted of its own accord and that are now at risk following the Brexit vote. But it is equally the case that EU law has not stopped successive UK governments from implementing policies based on an extreme conception of labour market flexibility that has few counterparts among developed industrial nations.[21] EU law was no barrier to deregulation in the UK as the EU's legal competences in the social policy field are limited. There is no comprehensive floor of rights in the European labour market, but instead a set of disjointed and fragmented protections.

Things are not getting better for EU social policy. The Court of Justice, building on its *Laval* jurisprudence, has recently started to treat the minimum standards set out in labour law

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[17] *See* DEAKIN & MORRIS, *supra* note 4, pp. 306-18 (on minimum wage regulation including the powers of the Agricultural Wages Board).

[18] *See* Directive 2008/104/EC and SI 2010/93; DEAKIN & MORRIS, *supra* note 4, pp. 209-11.

[19] Small Enterprise, Business and Employment Act 2015, s. 153, inserting ss. 27A and 27B, Employment Rights Act 1996.

[20] *See* Catherine Barnard, Simon Deakin & Richard Hobbs, *Opting Out of the 48-hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the United Kingdom*, 32 INDUSTRIAL LAW JOURNAL 223-252 (2003).

[21] Deakin & Willkinson, *supra* note 11.

directives as maxima, thereby preventing member states from adopting more worker-protective rules. This has already resulted in a tangible weakening of the operation of the Acquired Rights Directive, designed to protect workers' terms and conditions of employment following outsourcing and other business transfers, across Europe but in the UK in particular. The effect of the Court's *Alemo-Herron* judgment[22] has been to remove the collectively negotiated floor of rights that operated across local government and the National Health Service, and to drive a race to the bottom in public procurement. Extraordinarily, a justification for the Court's approach is a newly-discovered right of business to operate without regulatory constraints under Article 16 of the Charter of Fundamental Rights of the European Union.[23] Thus human rights law is being used to entrench the rights of capital in what the Court's Advocate General recently described as the EU's "free market economy."[24]

To sum up the second point of this essay: the perception that EU rules on free movement of labour are driving casualisation of work and wages in the UK labour market is partially correct, but a much bigger causal factor is UK domestic social policy, together with the EU's rules on freedom for enterprises to move across borders in search of low-cost regulatory regimes.

Is there a way out of this bind? Brexit, whatever form it might take (and this is still not at all clear), would not help, since the formal restoration of British legal autonomy (or "sovereignty" as it is grandly but, given the high degree of interdependence in today's globalised world, misleadingly termed) would provide no guarantee of a switch of direction in domestic social policy. Depending on which kind of relationship the UK might have with the EU post-Brexit, many of the same single market rules that are the root cause of the problem would still apply, but possibly without the social protections currently guaranteed by EU law, depending on how post-Brexit negotiations go.

If the UK exited the single market altogether, as would be the case if it were outside the EEA, it would have complete freedom from internal market rules, and so would not be bound by *Laval*, but would also be able to disapply EU labour laws. If social policy

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[22] Case C-426/11 *Alemo-Herron* v. *Parkwood Leisure Ltd.* [2013] IRLR 744.

[23] *See* Stephen Weatherill, *Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract,"* 10 EUROPEAN REVIEW OF CONTRACT LAW 157 (2014); Jeremias Prassl, *Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law*, 42 INDUSTRIAL LAW JOURNAL 434 (2013).

[24] Case C-201/15, *AGET Iraklis*, Opinion of AG Wahl, at [1]; Nicola Countouris & Aristea Koukiadaki, *The Purpose of European Labour Law: Floor of Rights or Ceiling?*, SOCIAL EUROPE (June 6, 2016), *available at* https://www.socialeurope.eu/2016/06/purpose-european-labour-law-floor-rights-ceiling/.

directives were no longer binding and British governments reverted to the deregulatory position that they have mostly followed (in areas beyond EU law) since the 1980s, British workers would be significantly worse off, although given the current failure of EU law to provide a break on the UK's lax labour regulation regime, this would be a difference of degrees, not kind.

Should a social democratic response be to reopen the issue of free movement for labour, as recommended by UK Labour Party politicians as the Brexit debate entered its final week and as some are now suggesting in the wake of the vote? Free movement has never been an unqualified right, and it should be possible to have a debate about the social security and labour law regimes governing migrant and posted workers, within the framework of the existing EU Treaties.

But it follows from the analysis set out above that making minor adjustments to the rules governing migrants' social security and labour law rights would only address part of the problem. It is the rules governing free movement for capital, not just labour, that must be reconsidered. The principle of freedom of establishment, together with the ancillary right to provide services across borders, has been twisted out of shape by a combination of legally dubious judgments and ill-considered legislative initiatives over the last decade.[25] To put this right does not require abandoning the 'four freedoms' but it does mean having a serious debate about the emerging federal structure of the Union and the relationship between EU law and the laws of the member states, of the kind that has been taking place in American jurisprudence for over a century.[26]

Addressing the problem of economic insecurity will be critical not just for the fate of Britain in Europe, but for the future of the EU. This is because the Brexit debate has thrown into sharp relief the cost of market integration in the absence of social protection: insecurity and marginalisation for growing numbers of European citizens. Social Democratic and Christian Democratic parties will cede the issue to the authoritarian Right if they do not address this question head on. They need to grasp the nettle: regulate capital, not just labour, or the European project will fail.

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[25] Deakin has argued that the decisions in *Viking* and *Laval* were juridically questionable. *See* Simon Deakin, *Regulatory Competition After* Laval, 8 *CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 581 (2008).

[26] *Id*. (on the relevance of the US model to EU law in this context).

[This is an extended and updated version of a blog that originally appeared on the Social Europe website and is reproduced here with permission. It may be worth adding that the blog was written on 15 June 2016, the day before the politically motivated killing of the Labour MP, migrants' rights activist and Remain supporter, Jo Cox, and published by Social Europe on 20 June, three days before the Brexit Referendum.]