

Brexit and workers' rights

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The labour law of the UK and of other Member States is, and will become, more truly European than appears from the formal imprint of EC labour law. It is European rather by reflecting the cumulative experience of national labour laws, filtered through the prism of the EC institutions and refined in the crucible of the developing European polity. The tendency towards convergence of UK labour law with the labour laws of other Member States of the EC is driven in the main by the institutional pressures of EC membership, and, to a lesser extent, is the consequence of the workings of the international economy and, though less significant, a single European labour market. The dynamic of this convergence process is complex and its results are far from complete.

Professor Brian Bercusson, 'The Conceptualisation of European Labour Law' (1995) 24 *Industrial Law Journal* 3

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Introduction

- 1.1** On 23 June 2016, the United Kingdom held a referendum on whether to remain in or leave the European Union (EU). The referendum resulted in 51.9% of voters voting to leave, though a majority in Scotland and a majority in Northern Ireland voted to remain. This largely unexpected result led to the resignation of Conservative Prime Minister David Cameron and to Theresa May assuming office. On 29 March 2017, the UK government initiated the official EU withdrawal process required by the Treaty on the European Union (TEU), Article 50, notifying the European Council of its intention to withdraw from the Union. This put the country on course to complete the withdrawal process by 29 March 2019.
- 1.2** The UK government headed by Theresa May (substantially weakened as a result of the snap election of June 2017, called by Mrs May to 'strengthen her hand' in the Brexit negotiations) failed to conclude and persuade Parliament to ratify an agreement by that deadline. The deadline was extended twice, in compliance with the TEU, first to 12

April 2019 and eventually to 31 October 2019. Within that timeframe the UK and the EU would have to a) negotiate and agree a withdrawal agreement and a framework for their future relationship, while b) navigating the uncharted waters of the Article 50 process, and c) face complex and tough choices in terms of the details of their future trade relationship, including the application of EU-derived labour standards.

Article 50

- 1.3** According to the TEU, Article 50(2), in the course of this negotiating period, the UK and the EU ‘shall negotiate and conclude an agreement . . . setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. The arrangements for negotiating the agreement are detailed in the Treaty on the Functioning of the European Union (TFEU), Article 218. In essence, they prescribe the involvement, at different levels and with different capacities, of four key EU institutions: the European Council, the Council of the EU, the European Commission, and the European Parliament. Member States cannot individually negotiate with the withdrawing country.
- 1.4** Article 50, as it is now widely understood, sets out two stages for the negotiations between the EU and any Member State wishing to withdraw. The first stage consists of negotiating and concluding ‘an agreement . . . setting out the arrangements for its withdrawal’, which is sometimes colloquially referred to as ‘the divorce’ agreement. The European Council clarified early in 2017 that this withdrawal agreement would have to focus on matters such as the financial settlement, the rights of EU citizens living in the UK and of UK nationals living in other EU countries, the legal effects (if any) of pre-existing EU law in the domestic legal systems of the UK, and other matters that would ensure an orderly transition between actual EU membership and the ‘future relationship’.
- 1.5** As part of this first phase of the negotiation, the UK and the EU can also agree on a ‘framework’ for their future relationship, as Article 50 itself provides. But the European Council, already in its April 2017 ‘guidelines for Brexit negotiations’, clarified that an actual ‘agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country’.¹ Basically, the terms of a future trade agreement or other type of relationship between the UK and the EU (including the actual legal effect of EU labour law directives, or the ability of UK companies to

access the Union's single market or customs union) cannot be negotiated in detail, let alone agreed, until after the 'Brexit date'.

- 1.6 The latter is a date that may or may not coincide with the expiry of the Article 50 deadline, depending on whether the 'divorce' agreement includes a transition phase during which the precise terms of the 'future relationship' can be set in stone and ratified by the two sides, the UK and the EU. This is a crucially important point, as it creates a strong incentive on the UK to agree some form of 'withdrawal agreement' – possibly one with a transition period inserted in – and avoid a 'No-deal Brexit' that would inevitably lead the country to an abrupt termination of its EU membership without any 'future relationship' deal waiting at the other side of the 'Hard-Brexit' door. The agreement currently on the table (to which we return) provided for a two-year transition.

'Brexit means Brexit'

- 1.7 'Brexit means Brexit', the mantra obsessively repeated by Theresa May in the early months of her premiership, will probably go down in history as one of the most fatuous political slogans ever coined. The reality is that the legal effects of Brexit can vary considerably depending on what kind of Brexit deal the UK and the EU might be able to agree following the Article 50 negotiating period. The terms of this 'deal' (and in particular the terms of the 'future relationship' agreement) would also have implications for the legal effects of any EU-derived labour rights in the UK.
- 1.8 Later we outline in greater detail a number of alternative Brexit scenarios, and discuss their potential impact on workers' rights. For the purposes of this introduction, suffice it to say that there is a wide range of possible Brexit outcomes. From so called 'No-deal Brexit', where the EU and UK legal systems would sever all existing legal relations without any new agreed arrangements supplanting them, to a Brexit with very close ties with the EU, as close as those currently enjoyed by members of the European Economic Area (EEA) such as Norway or Iceland. Some would also advocate 'No Brexit' as a possible outcome of the Brexit process, whereby the UK might decide to either revoke Article 50, perhaps following a new Brexit referendum or a general election.
- 1.9 Two things, however, were clear right from the outset. First, the negotiations would be a very complex, technical, and politically charged affair, with the two sides of the table having to reach agreement on the fate of some '12,000 EU regulations in force', 'around 7,900' UK statutory

instruments implementing EU legislation, and ‘186 Acts of Parliament’ incorporating ‘a degree of EU influence’.² A monumental task and one that could have a considerable impact on UK workers’ rights, given that an important component of UK employment law is grounded in EU law, in particular EU directives, but also in directly applicable EU Treaty provisions and in decisions of the Court of Justice of the EU.

- 1.10** The other certainty we had from the very early stages of the process was that in negotiating a Brexit deal, the UK would face tough choices, and would not be allowed to ‘cherry-pick’, i.e. would not be allowed the advantages of membership (no tariffs, free trade within the other EU members, passporting rights for its financial services, and more) without any of the, actual or perceived, disadvantages of membership (contributing, in some form or another, to the EU budget, complying with EU regulatory standards, and/or accepting the indivisibility of the four fundamental internal market freedoms). Early on, the European Council was adamant in its own negotiating priorities, by stating that:

Any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure *a level playing field*, notably in terms of competition and state aid, and in this regard encompass *safeguards against unfair competitive advantages* through, inter alia, tax, *social*, environmental and regulatory measures and practices.³

But what does Brexit mean?

- 1.11** As suggested above, there are a number of possible alternative scenarios between the extremes of full EU membership and ‘Hard Brexit’. Although there are potentially five basic templates for the continuing relationship between the EU and the UK, post referendum discussions tended to focus on two. The first was the so-called Norwegian option, Norway being both a member of the European Free Trade Area (EFTA) with Iceland, Lichtenstein, and Switzerland and a member of the European Economic Area (EEA) composed of the 28 EU states, Iceland, Lichtenstein, and Norway. Norway is also a signatory to a number of bilateral agreements with the EU, with the result that Norwegian workers and businesses can benefit from access to the single market for the sectors covered by the agreements (including the service sector, but

not agriculture and fisheries). Norway is not part of the customs union, however, and while this enables it to have its own commercial policy, it means that goods in transit across, say, the Swedish and Norwegian border are subject to checks and tariffs.

- 1.12** By virtue of its EEA membership, Norway is expressly subject to much of the EU *acquis* which is part of what the EEA Treaty refers to as ‘common rules’, including rules on EU state aid legislation and competition law.⁴ Article 68 of the EEA Agreement provides that in the field of labour law Norway ‘shall introduce the measures necessary to ensure the good functioning’ of the EEA Agreement. These include most of the EU labour law, health and safety, and equality directives.⁵ On paper, therefore, a future UK–EU trade relationship based on the Norwegian/EEA model would protect most of the labour rights currently enjoyed by UK workers through membership of the EU. However, it would not allow the UK to have a say in the future development of Social Europe and, perhaps most importantly, in the process of European economic integration. UK workers would become passive recipients of EU labour law and continue to enjoy the benefits of the single market, but would not be able to contribute to shaping European law.
- 1.13** The second possible template post-Brexit, which was most widely canvassed, is what is often referred to as a ‘Canada-style’ free trade agreement (FTA), thus establishing a trade relationship with the EU similar to the one the EU has not only with Canada but with many other third countries all over the world.⁶ Although it thus has many bilateral agreements, the EU–Canada Comprehensive Economic and Trade Agreement (CETA) of 2017 is nevertheless often referred to as a likely template for a future trade agreement. This is the only type of possible future trade relationship that would allow the UK to tick all its key ‘red-lines’ and in particular the aspiration outlined by Theresa May in her ‘Lancaster House’ speech to have its own, independent commercial policy. CETA is indeed one of the most advanced FTAs ever to be concluded and once fully in force it will remove some 98% of pre-existing tariffs between the EU and Canada, including – progressively – in the automotive and other industrial sectors.⁷
- 1.14** Many FTAs (including CETA) contain ‘labour clauses’. Article 23.3 of CETA expressly refers to the duty for each party to ‘ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work’, specifically fundamental ILO instruments on freedom of association, collective bargaining, child and forced labour, and discrimination. But free trade agreements are no

substitute for EU law, which is distinguished by being (i) a dynamic body of law, (ii) covering a wide range of issues, and (iii) capable of individual enforcement. Free trade agreements, including CETA, in contrast address the very basic international standards, which it ought not to be necessary to address in a treaty between developed nations, characterised with vague commitments on other questions, such as the ‘establishment of acceptable minimum employment standards for wage earners’. In addition, free trade agreements impose obligations that are not, strictly speaking, legally enforceable by individuals who have been prejudiced by breach.

Brexit and workers’ rights

- 1.15** At risk of oversimplifying what is self-evidently a very complex process, it is fair to say that the Brexit options are inherently based on a fundamental trade-off between regulatory sovereignty and market integration. In simple terms, the more the UK seeks to distance its regulatory system from the EU (including in terms of its labour and social legislation), the less likely it is to retain its current benefits in terms of participation in the EU customs union and access to the single market. And, vice versa, the more it seeks to retain the current economic benefits of the relationship, the more it will have to accept a certain degree of EU regulatory interference in its domestic legal system.
- 1.16** This interference is currently mitigated by the fact that, as an EU member state, the UK does participate as an equal partner in the very complex EU regulatory system, sometimes described as ‘pooled sovereignty’. But under all Brexit outcomes (bar the ‘No Brexit’ one), this ability to participate in the functioning of the EU as an equal partner would be forfeited. As far as labour rights are concerned, the various Brexit options present the following challenges.
- **Content and breadth of UK workers’ rights.** As we point out below, an important share of what we call UK employment law is a product of EU law, principally of EU labour and equality law directives. All Brexit options (including one based on a ‘Norway-style’ deal) would sever the direct link currently existing between these EU instruments and UK labour law, in the sense that UK governments would be able to opt-out of at least some of them (as even Norway does, albeit to a limited extent), while of course having to relinquish something in terms of market access or participation to the customs union.

- **Legal effects of EU derived labour rights in the UK.** As a general rule, EU law takes precedence over conflicting domestic law (by virtue of what is known as the ‘supremacy’ principle) and can be invoked in domestic courts (the so called ‘direct applicability’ principle). Under certain conditions EU law may also be directly effective, at the very least between an individual worker and the state by demanding domestic courts interpret UK labour law in line with EU law.

Perhaps most importantly, any question of interpretation or validity of EU legislation is ultimately decided by the European Court of Justice, which – along with the European Commission – plays a central role in the enforcement of EU law. All Brexit options would deprive EU law of these legal effects, although under certain scenarios (e.g. the Norway model) it may be possible, and indeed necessary, to retain at least some of them in practice as a *quid pro quo* for market access.

- **Dynamic evolution of UK labour rights alongside EU labour rights.** By virtue of being a member state of the EU, the UK is currently fully involved in its law and policy making processes. Its contribution to the development of EU labour law has not always been straightforward, with a number of EU labour law directives either halted or watered down as a direct consequence of UK governments’ pressure (for instance, the Temporary Agency Work Directive, 2008/104).

But by and large the EU has managed, over the years, to develop a distinct body of EU labour law instruments, and aspires to continue to do so in the future, with a number of instruments being adopted in recent months or currently in the legislative pipeline. Under most Brexit scenarios the UK would miss out on any future developments of the EU social *aquis*, and would also miss out on the jurisprudential developments produced by the CJEU case law.

- 1.17** There is no doubt that, post-Brexit, any future UK progressive government could both replicate and even add to the EU social dimension, which by virtue of seeking ‘minimum requirements for gradual implementation’ (TFEU, Article 153(2)(b)) is often somewhat minimalistic. But by the same token, future governments may decide to drive UK labour law below EU standards, most likely as a deliberate attempt to undercut them and boost domestic competitiveness at the expense of labour costs. Given the comparatively weak enforcement apparatus of other supranational sources of labour rights, such as the ILO instruments and the European Social Charter provisions, once UK labour

standards cease to be anchored to the EU legal system, they would no doubt become a hostage to fortune, with even more dramatic regulatory swings between successive Labour and Tory majorities.

- 1.18** So far as the last point is concerned, Brexit is *forever*, and an honest appreciation of history should alert us to the dangers, just as optimism about a Labour government should temper our concerns. It is worth noting that UK labour standards tend to be more robust – and more or less on a par with European standards – in those areas presided over by EU labour law instruments (e.g. working time, equality law, business restructuring). Whereas they tend to fall below European standards in areas such as unfair dismissal where, as noted in 2011 by the Beecroft Report '[t]here is no EU concept of “unfair” non-discriminatory dismissal, so there are no other EU constraints on what the UK can do in this area'.⁸ These points are further developed in the following text.

Conclusion

- 1.19** In order to better understand the impact of Brexit on workers' rights, in the pages that follow we provide an account of the constitutional foundations of European labour rights in the United Kingdom, as well as the extent to which British labour law is informed by mandatory European standards. It is unquestionably the case that without the EU influence, British labour law textbooks would be very much thinner, lighter, and cheaper. In the pages that follow we also address the question of the free movement of workers, a right which – it is often forgotten – is one enjoyed by many British citizens as well as by the citizens of other European countries.
- 1.20** The second part of this article considers the implications of Brexit for workers' rights, and the implications of a 'Hard Brexit' in particular. Several risks arise from the fact that we remove the obligations imposed by EU law to maintain a minimum level of standards covering a wide range of areas of (social) regulation, these standards being dynamic in their operation as a result of judicial intervention, and dynamic in their content in the sense that their regulatory – and judicial – protection continues to grow. We also assess the implications of a Free Trade Agreement with the USA, which the Right see as a desirable alternative, despite the limitations of Free Trade Agreements. In the pages that follow we also consider the claim that there will be a Brexit dividend for workers' rights, which we dispute. Even if there was such a dividend, it would be overwhelmed by the losses, particularly if Brexit continues to be 'owned' by the Tories.

Box 1 – Introduction

Key points

- In a referendum held on 23 June 2016, 51.9% of voters expressed support for the UK to leave the EU.
- On 29 March 2017, the UK government initiated the official EU withdrawal process required by Article 50 of the Treaty on the European Union (TEU).
- Article 50 TEU provides that the EU and the UK have two years to negotiate a ‘withdrawal agreement’ that would set a transition period and a final ‘Brexit date’.
- The process was supposed to be completed by 29 March 2019, but the deadline was extended twice after the UK Parliament voted down the withdrawal agreement negotiated by PM Theresa May. It is now expected to be completed by 31 October 2019.
- An actual agreement on the future relationship between the EU and the UK can only be finalised and concluded after Brexit date.
- The EU has stated clearly that the UK will not be allowed to ‘cherry pick’ and that full access to the EU single market and customs union requires accepting the four freedoms (including free movement of goods, services, capital and workers) and compliance with EU labour standards.

Constitutional background

Introduction

- 2.1** In this section we set out the constitutional context within which EU labour law applies in the United Kingdom. Much of the background to – and discussion about – Brexit has been dominated by constitutional issues, and in particular the need to ‘regain control’ and reclaim the sovereignty of Parliament from the supremacy of the EU executive bureaucracy. But what are the legal foundations of workers’ rights in the EU, and what are the means by which these rights are given legal effect in the United Kingdom? Here we address four

issues: (i) the constitutional values of the EU, which have helped to inform the workers' rights instruments; (ii) the different forms of EU law, which are used to create these rights; (iii) the steps taken by Parliament to give effect to EU obligations; and (iv) the implications of Brexit for the continued operation of these rights.

- 2.2** It is often said that EU membership presented a major threat to the sovereignty of the British Parliament. Historically, and as far as the UK is concerned, this was never the case. But it is an argument that was advanced by the Hard Right, who having advocated the need to reclaim the principle of parliamentary sovereignty as a reason for Brexit, are now embarrassed by the principle as Parliament stands in the way of the popular sovereignty of the referendum. But whatever the impact on the constitutional powers of Parliament, there can be no doubt that the supremacy of EU law helped to create workers' rights during the dark days of Tory governments, and helped to contain the deregulatory impulses of the Coalition government. As the 'Beecroft Report' commissioned by the Coalition government in 2011 makes clear, the supremacy of EU law prevented a number of statutory protections from being repealed.

EU 'constitution'

- 2.3** EU law draws on a number of sources, beginning with treaties, which have been amended on several occasions to expand the powers of the EU institutions, as the number of countries grew beyond the original six. The two major treaties are the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU), as last modified in 2009 with the entry into force of the Lisbon Treaty. Also important is the Charter of Fundamental Rights of the EU, which was concluded at Nice in 2000, and given legal effects with the Lisbon Treaty. As reflected in these documents, the constitutional foundations of the EU are built on an ideological contradiction, reflecting a tension and competing visions of the European project, part market based, part politically driven. It would not be unfair to say that for the past two decades, the project has swung in favour of a more neo-liberal and deregulatory vision, that – at a domestic level – we tend to associate with centre-right politics including New Labour which not only sat comfortably with but also led that vision.
- 2.4** It would also be true to say that the origins of what was then the European Economic Community (EEC) were built on principles of economic liberalism, based on four fundamental freedoms that

continue to operate at the heart of the TFEU. These are respectively the right to free movement of goods, services, capital, and persons. The right of workers to move freely to another member state, a right as important to businesses in sourcing labour as it is to workers providing it, is considered part of the broader right to free movement of persons, which includes the right of self-employed persons to move to other countries to provide their services. To the extent that labour rights – notably (and exclusively) the right to equal pay – were included in the founding Treaty of 1957, this was for purely economic reasons, specifically to protect countries where the principle was already established from unfair competition from those countries where it was not.

- 2.5** But there was also an emerging social dimension, beginning in the mid-1970s, advanced under Jacques Delors with the Charter of Fundamental Rights of Workers in 1989, and reaching its climax in the TEU in 2008, which sets out the objectives of the EU, in which it is said that:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.⁹

Some see these as pre-eminently social democratic values, reinforced by obligations to combat ‘social exclusion and discrimination, and . . . promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’¹⁰ and to ‘take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’, when defining and implementing all its policies and activities.¹¹

- 2.6** But of course these values and objectives are set beside the economic freedoms of business, which are also constitutionally entrenched. And to the extent that the TEU refers to the EU being grounded in a ‘social market economy’ rather than a free market economy, this is contradicted by TFEU, Title VIII, which empowers the EU institutions to take steps to promote an ‘open market economy’.¹² Similar contradictions are to be found in the EU Charter which seeks simultaneously to empower both workers and business. So while there is recognition of the needs of workers to be protected (for example, by the inclusion of

a Solidarity Title in the Charter, Title IV), there is also a bizarre inclusion of a ‘freedom to conduct a business’ in Article 16. Unfortunately, the Charter has from time to time been (ab)used to consolidate the legal subordination of these fundamental rights to the fundamental freedoms in the TFEU.¹³

Part of this tension between economic freedoms and social rights may be inherent to the very idea of a ‘highly competitive social market economy’, arguably an oxymoron more than a synthesis between liberal market priorities and social democratic values. What is clear, however, is that the single market – with its four, indivisible, freedoms – sits at the very core of the European project, and is perceived as vital to the project itself.

Sources of EU law

- 2.7** The EU treaties referred to above are an important source of EU law. Apart from (i) setting out the goals and (ii) creating the institutions of the EU (the European Parliament; the European Council; the Council of the European Union; the European Commission; the Court of Justice of the European Union; the European Central Bank; and the Court of Auditors), and they also (iii) confer rights on companies and individuals, such as the right to freedom of establishment, or the right to equal pay, as already referred to above. Many of these rights have what is referred to in the EU legal jargon as ‘horizontal direct effect’, which means that they can be enforced against Member States which violate them, but also against private parties (such as trade unions in the case of freedom of establishment, and employers in the case of equal pay). This is in contrast to rights that are said to have ‘vertical effect’, which means that they can be enforced only against Member States.
- 2.8** Otherwise, the treaties (iv) set out the legislative powers of the different EU institutions, and the limits to the scope of these powers. The legislative process typically begins with a proposal from the Commission, which requires the approval of the Council and the consent of the Parliament, typically acting as co-legislators. A range of different instruments may be used for legislative purposes (including regulations and directives), though according to TFEU, Article 153(2) (b), in the field of workers’ rights, directives are usually the preferred method of intervention. A Directive will set out the framework and policy goals to be implemented, but will leave the means of implementation to domestic law, which can adapt the requirements of the Directive to national

conditions. In practice, however, there may not be much room for manoeuvre. In some circumstances, directives may be made by a process of ‘Social Dialogue’ between business and labour, detailed under TFEU, Articles 154–155.

2.9 The power to regulate by way of Directive has produced a significant volume of legal instruments which are dealt with below, though it may be noted at this stage that there is no power at the EU level to legislate on pay, freedom of association, or the right to strike (TFEU, Article 153(5)). These are matters for national law, though restrictions on freedom of association and the right to strike could conceivably be challenged if they impose unacceptable restrictions in the implementation of EU law, and as noted above in paragraph 2.6 domestic legislation on industrial action is not immune from CJEU scrutiny when it conflicts with EU law. But, however directives are made, they must be complied with, and failure to comply may lead to enforcement proceedings against any defaulting country. These proceedings may be brought by the Commission, and despite claims in the press about the UK ‘gold plating’ the implementation of directives, several important cases – some of them detailed in the text that follows – have revealed shortcomings in British law, which has had to be changed as a result.

2.10 There are, however, other ways of giving binding effect to directives. By virtue of the ECJ decision in *Marshall*,¹⁴ in some circumstances directives may be enforced directly by a worker against a public sector employer, having what EU lawyers refer to as ‘vertical direct effect’. Directives may also have indirect legal effects, in the sense that domestic law must always be interpreted and applied consistently with the requirements of a Directive, wherever possible to do so, unless a literal interpretation of domestic law would be inconsistent with the Directive.¹⁵ In cases where a Directive does not have direct effect or where its indirect effects are such that domestic law cannot be construed consistently with its terms, by virtue of the ECJ decision in *Francovich*, it may be possible for a party prejudiced by a failure to implement a Directive to bring legal proceedings to recover losses against the government for its failure to implement properly.¹⁶

Supremacy of EU law

2.11 EU law thus provides binding obligations on Member States, which are designed to be enforceable in national courts. According to the

ECJ, the EU has created a 'new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields'.¹⁷ As the competences of the EU institutions have increased over the years, so the limitation of these sovereign rights claimed by EU law, and the ECJ has grown in significance. This, it is often claimed, has resulted in a gradual but growing loss of national sovereignty. A more accurate view would be that, from a UK perspective, what has been created here is two overlapping legal systems, both of which claim but share sovereignty. Before addressing this conflict, however, it is necessary first to examine how EU law was given legal effect in the UK.

- 2.12** Joining the EEC, as it then was, on 1 January 1973 was not enough to enable EEC law to be enforced by the British courts. For the purposes of British law, EU law is a foreign system which has no legal effects in the United Kingdom without parliamentary authority. So while the government could take us into what is now the EU, only Parliament could give legal effect to the obligations of membership. There are two issues here: one is the need for legislation that would enable EU law designed to have direct effect (which, as a doctrine, predated accession) to be enforced in the British courts; the other is to provide the means to enable EU law that does not have direct applicability to be implemented by legislation. Both of these issues were addressed by the European Communities Act 1972, which famously provided by s 2 that directly effective EU law was to be given direct effect in the UK:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.

- 2.13** So far as implementing EU law that is not directly applicable is concerned, this could always be done by means of primary legislation. But this would be time consuming and with growth in the volume of EU measures to be implemented, it would be impractical. So the European Communities Act 1972 provides a fast track procedure that enables directives and other measures to be quickly introduced by delegated legislation (statutory instruments), with minimal parliamentary scrutiny. Thousands of measures have been produced in this way, which is also the chosen method for the implementation of directives dealing with

workers' rights, though it is true that EU inspired collective redundancy procedures were implemented in the Employment Protection Act 1975, and that much of EU equality law is to be found in the Equality Act 2010.

- 2.14** EU law thus requires EU Member States to have standards on matters that otherwise might not be addressed – such as equal treatment for agency, fixed term, and part-time workers. It also imposes minimum standards below which domestic law may not fall. Where there is a gap between EU and national law, EU law must prevail because of the supremacy of EU law, if for no reason other than it is necessary to have universal minimum standards throughout the Union, a principle developed by the ECJ before UK membership of the EEC.¹⁸ This is an issue that eats into the principle of the sovereignty of the British Parliament if EU law is to take priority over inconsistent British law. But apart from the fact that the UK Supreme Court (UKSC) has made clear that the withering of parliamentary sovereignty has been greatly exaggerated,¹⁹ the supremacy of EU law in the face of defective domestic implementation is one from which workers have largely benefitted.

Effect of Brexit

- 2.15** It is not necessary here to reprise in detail the steps taken since the Brexit referendum in 2016. From a constitutional point of view, two important pieces of legislation have been required to give effect to the result. The first is the European Union (Notification of Withdrawal) Act 2017, which gave parliamentary approval to the Prime Minister to trigger the procedure under the TEU, Article 50, for withdrawal from the EU. The legislation was necessary because of the intervention of the courts in the *Miller* case,²⁰ which held that because of the principle of parliamentary sovereignty, the government could not give notice under Article 50 without parliamentary approval. The *Miller* case is otherwise important for the belated discovery that EU membership did not after all undermine the principle of parliamentary sovereignty, a principle which indeed has been largely vindicated by Brexit itself.
- 2.16** Having given notice to withdraw, a second important piece of legislation dealt with the actual mechanics of withdrawal, and the legacy of 46 or so years of membership in the course of which a huge body of EU law has been integrated as UK law. The European Union Withdrawal Act 2018 provides that the European Communities Act 1972 is to be repealed on 'exit day', originally defined as 29 March 2019 at 11pm (extended to 31 October 2019 by the European Union Withdrawal Act 2018 Exit Day Amendment Regulations 2019).²¹ In order to make the transition from membership to

non-membership as smooth as possible, Parliament sought to transfer all existing EU law to a new legal base under British law. The Act expressly provided for the EU *acquis* to be converted into domestic law, and for national implementing measures to continue to apply.

2.17 This means that the EU-derived rules in force on the day of departure from the EU will continue to apply on the day after (European Union Withdrawal Act 2018, ss 1–4), though the situation does give rise to some no doubt unintended anomalies, if for example the freedom of movement provisions are to continue to operate. While EU businesses and workers will have a right under what is now British law to move here freely, there will be no reciprocal right of British businesses and workers to move to the EU. Nevertheless, the European Union Withdrawal Act 2018, s 6 also provides that the interpretation of EU derived law would continue as per the interpretation applicable before departing from the EU, although the UK Supreme Court (but not other domestic courts except for the High Court of Justiciary dealing with Scottish criminal cases) would now be free to depart from any retained EU case law, and any prior interpretation given by the ECJ/CJEU.

2.18 So to begin with, the European Union Withdrawal Act 2018 will ensure that, upon leaving the EU, all existing labour standards deriving from or connected to EU law will continue to apply. However, section 7 of the Act also clarifies that upon leaving the EU both Parliament and in certain circumstances the government would be free to repeal any ‘retained EU law’. This is the inevitable consequence of Brexit, and the desire to ‘regain control’. Which means that British workers would lose the European safety net on labour rights which successive majorities and governments will be free to revoke or dilute. It is worth noting that while the UK has always been free to improve on EU minimum standards, it has rarely done so. Otherwise, although pre-Brexit jurisprudence of the ECJ will continue to apply until overturned by the UK Supreme Court (or Parliament), any post-Brexit decisions of the ECJ/CJEU will not be applicable in the UK, even on a matter of retained law.²²

Conclusion

2.19 There was always intended to be a third and probably a fourth Act of Parliament to complete the Brexit process, which is likely to take many years fully to complete. The third Act would cover a transition phase to a full Brexit, while the fourth would address the future relationship with the EU. As discussed later, the terms of the former, the transition period, were eventually set out in the Withdrawal Agreement negoti-

ated by the May government but rejected three times by Parliament, while a (very vague) outline of what might be approved by the latter was set out in the Political Declaration that accompanied the Withdrawal Agreement. Both the Withdrawal Agreement and the Political Declaration made provision for workers' rights, provisions which will be lost along with the rest of the texts unless their substance is to be revived in some form or shape in the months to come.

- 2.20** In the absence of a withdrawal agreement to replace May's agreement there will be a 'Hard Brexit' (with no transition phase), and no indication of what the future relationship with the EU will look like. The position will be governed by the European Union (Withdrawal) Act 2018 which will come into force immediately, regardless of the UK and EU concluding a withdrawal agreement within the timeframe of Article 50. It is highly likely that, following a 'Hard Brexit', the UK and the EU will want, eventually, to negotiate some sort of trade deal outside the framework of Article 50. But the 'cold turkey' Brexit will be a clean break and it will be for the UK to negotiate an agreement for the future from outside rather than inside the EU. The content of that agreement will be crucial to the continuing operation of retained EU workers' rights, as well as the application of any future EU initiatives. Paradoxically, the fact that – at that point – the UK is unlikely to be negotiating from a position of strength, the EU may be in a position to insist on at least some degree of regulatory alignment between UK and EU social standards.

Box 2 – Constitutional matters

Key points

- **The EU is a unique international organisation, and its legal acts typically take precedence over any conflicting national provisions – they are 'supreme'.**
- **EU law, unlike other international law, can also bestow rights directly to individual workers, who can rely on them in legal proceedings against an employer before a tribunal.**
- **These peculiarities of EU law were well understood when the UK joined the EEC/EU in 1973, and the European Communities Act**

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1972 ensures their compatibility with the UK constitution and parliamentary sovereignty.

- The establishment and functioning of the ‘single market’ – and the indivisibility of the four market freedoms – sit at the core of the European integration project.
- During the Delors years the EEC/EU developed a ‘social profile’, partly to counterbalance the original free market rationale that led to its foundation. Such social policies however have been on the wane since the previous decade, but for some timid attempts to relaunch them in the last three years.

EU membership and workers’ rights

Introduction

- 3.1** The impact of some four and a half decades of EU membership on the employment rights of UK workers has been both significant and extensive. Thus, some EU labour rights contained in primary sources (mainly Treaty provisions and ‘general principles’) and, occasionally, secondary sources of EU law (mainly ‘directives’) have been recognised as having ‘direct effect’, meaning that individual workers have been able to rely on them directly before domestic courts, for example, the right to equal pay contained in the EU Treaty.²³
- 3.2** Secondly, a considerable share of UK labour legislation has been either directly shaped or effectively enhanced by a number of EU secondary sources, mainly directives, adopted by the EEC/EU, in particular in the areas of working conditions, equality and anti-discrimination, information and consultation, and health and safety. Typically, provisions contained in these directives have been implemented domestically by means of statutory instruments, usually under the authority of the European Communities Act 1972. Some EU obligations have been incorporated in pre-existing or subsequent Acts of Parliament.

Workers’ rights’ directives

- 3.3** In 2014, the British government estimated that ‘on average, there have been nearly two new workers’ rights directives introduced every

year since 1986 and this falls to one a year if the whole period of EU membership since 1973 is considered', with approximately 50 directives in the area of employment and social policy being in force at the time the report was produced.²⁴ Although other areas of domestic law are far more influenced by EU legislation,²⁵ this is an important figure. The table below contains a list of what many would regard as 'core', non- sector specific, EU workers' rights directives, excluding health and safety, but including the main anti-discrimination directives and some relevant instruments adopted under other legal bases (such as the Posted Workers Directive).

- 3.4** The main areas of UK employment protection legislation that have benefited from the influence of EU labour law directives are arguably equality legislation, the regulation of atypical forms of work, working time regulation, and the rights of workers during business restructuring processes. In all of these fields legislation has been passed to give effect in domestic law to EU obligations. The significance of this is that the directives (and other EU law sources, such as the Treaties in the case of equal pay) provide minimum standards below which British law cannot fall. As is widely understood, where there is a failure by the government to comply with these obligations, the matter ultimately can be referred to the CJEU for a ruling that may require EU law to be implemented, or standards operating in domestic law to be raised still higher.

EU Directive	Area
Directive 2010/41 of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive of 11 December 1986	Equality
Directive 2010/18 of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive of 3 June 1996	Equality
Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)	Equality
Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services	Equality

(Continued)

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EU Directive	Area
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	Equality
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin	Equality
Directive 92/85 of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding	Equality
Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security	Equality
Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time	Working conditions/ Working Time
Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work	Working conditions/ Working Time
Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship	Working conditions/ Working Time
Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work	Atypical Workers
Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP	Atypical Workers
Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work	Atypical Workers
Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship	Atypical Workers
Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Text with EEA relevance	Posting of Workers

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services	Posting of Workers
Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services	Posting of Workers
Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version) (Text with EEA relevance)	Business Restructuring
Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses	Business Restructuring
Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies	Business Restructuring
Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (Text with EEA relevance)	Information and Consultation/ Worker Participation
Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation	Information and Consultation/ Worker Participation
Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees	Information and Consultation/ Worker Participation
Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees	Information and Consultation/ Worker Participation

Employment relationship

- 3.5** While the domestic right to a written statement of terms of employment, currently enshrined in ERA 1996, s 1, predates the adoption of Directive 91/533/EEC by nearly three decades, the latter nevertheless extended and improved the obligations imposed on employers

to provide information about the terms of the contract. It also reduced the period (to eight weeks) within which this was to be done, which would benefit workers on short term contracts in particular. Like many other workers' rights' initiatives, Directive 91/533/EEC drew inspiration from the Community Charter of Fundamental Social Rights for Workers, which had been adopted in 1989. One of its commitments was that 'the conditions of employment of every worker of the EC shall be stipulated in laws, a collective agreement or a contract of employment, according to arrangements applying in each country'.

- 3.6** A first victim of 'Hard Brexit' could be the stronger set of entitlements currently contained in the recently adopted Directive 2019/1152 on transparent and predictable working conditions, which will come into force in August 2022. Among other things, this Directive provides far more stringent duties in terms of employers' obligations to provide information, which would now cover 'working patterns' as well as working hours. It also contains a series of new minimum requirements relating to working conditions that, depending on the implementation option decided by individual Member States, may go as far as including 'a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period' for all 'on-demand' contracts (Article 11(b)). This provision alone would go a long way towards protecting British zero-hours and other casual contract workers.

Equality and discrimination

- 3.7** The bulk of EU equality law is currently incorporated in the Equality Act 2010, and therefore stands on a much firmer legal basis than most of the other rights contained in EU directives. EU equality law generally also has what is referred to in the jargon as horizontal direct effect. This means that it can often be enforced by workers individually against their employer, where British law falls short, as is often the case – in relation to the scope of equal pay, and discrimination law. While it is true that again some aspects of UK equality law pre-date EU membership (race discrimination and equal pay) or the introduction of EU standards (disability discrimination),²⁶ and whereas British equal treatment standards sometimes exceed the standards set by EU directives, the influence of EU equality law on British law nevertheless has been correctly described as 'dramatic' (but not 'one dimensional').²⁷

3.8 It is arguably correct to say that to the extent that there has been a dramatic effect, the most significant advances have occurred not only as a direct consequence of the adoption and implementation of EU equality rights, as contained in the Treaties or in EU directives. Just as important has been the progressive interpretation of these provisions by the ECJ. The table below contains a short and non-exhaustive list of key ECJ rulings with a direct and fundamental impact on UK equality law. Many of these changes have been integrated in the Equality Act 2010, but some remain exclusively premised on the legal effect granted to ECJ judgments by the European Communities Act 1972, sections 2(4) and 3(1). The impact of these decisions is enhanced by the binding impact in the United Kingdom of ECJ decisions in cases brought before it from the other 27 EU Member States.

Leading British cases on equality law

Case	Impact
Case 129/79, <i>McCarthy v Smith</i>	Female worker allowed to compare her pay with predecessor's
Case 61/81, <i>European Communities v United Kingdom</i>	Right to equal pay even in the absence of a system of job classification
Case C-262/88, <i>Barber v Guardian Royal Exchange Assurance Group</i>	Occupational pension schemes amounting to 'pay' for the purposes of equal pay principle
C-32/93, <i>Webb v EMO Air Cargo (UK) Ltd (No 2)</i>	No male comparator necessary to establish discrimination against pregnant woman
Case C-271/91, <i>Marshall v Southampton and South-West Hampshire Area Health Authority (No.2) (1993)</i>	No cap on discrimination awards
Case C-13/94, <i>P v S and Cornwall County Council</i>	Gender reassignment discrimination prohibition
Case C-256/01, <i>Allonby v Accrington & Rossendale College</i>	Broad EU concept of 'worker' in equal pay cases
C-303/06, <i>Coleman v Attridge Law</i>	Prohibition of discrimination by association as direct discrimination

Maternity rights and parental leave

3.9 The United Kingdom introduced its first maternity leave legislation with the Employment Protection Act 1975, so before the adoption of an EC/

EU Directive on the subject. But the impact of this legislation was long hampered by its narrow application, and long qualifying periods for eligibility. The latter were, however, removed in the early 1990s, as a direct consequence of the adoption of the Pregnant Workers Directive 92/85/EEC, while the right to parental leave is also an EU initiative, having been introduced following a social dialogue agreement between the ETUC and the European employers (Directive 2010/18/EU). And while British maternity and parental leave rights are often portrayed as being more generous than EU obligations, the reality is that we are lagging behind average European standards and practices, especially in terms of paternity leave uptake.

3.10 The recently approved Work-Life Balance Directive 2019/1158 would introduce significant changes to UK legislation:

- First, it would ensure that the rights it confers apply to all ‘employment relationships’ (Article 2), which – through its reference to CJEU case law in paragraph 17 of the Directive’s Preamble – is likely to increase its scope of application well beyond the current narrow confines (and benefit various casual workers in the gig-economy, for instance).
- Second, Article 4(2) would transform paternity leave into a ‘day one right’ (like maternity leave), and the Directive encourages implementing Member States to provide for a payment or an allowance for paternity leave that is equal to that provided for sick pay and cannot be subject to a qualifying period exceeding 6 months prior to due date (Article 8(2)).
- Third, the Directive provides that the two months of non-transferrable leave per parent should also be paid, and ‘set in such a way as to facilitate the take-up of parental leave by both parents’ (Article 8(3)). Though again, this being a recently adopted instrument, these provisions will not be binding on EU Member States before August 2022, so possibly after the Brexit date (and a possible transition period).

Atypical and precarious workers

3.11 The adoption of Directive 97/81 on part-time workers, Directive 99/70 on fixed-term workers, and of Directive 2008/104 on temporary agency workers, filled an important gap in UK employment legislation. Before the adoption of these three instruments, the terms and conditions of

employment of all atypical workers received little attention in British legislation,²⁸ and indeed such workers were often excluded wholly or partially from workers' rights' legislation because of doubts about their legal status (temporary agency workers), express carve outs from the legislation (part-time workers), or authorised from specific provisions (unfair dismissal in the case of workers on fixed-term contracts). With the implementation of the three atypical workers' directives, the principle of equal-treatment between the three categories of atypical worker covered by them and comparable standard workers was finally introduced into British law.

- 3.12** The protective scope of the three directives and their implementing measures is anything but trouble-free. That said, the New Labour government is to blame for some of that. Not only did it boast about the limited scope of the Part-Time Workers Regulations and their implementation in a business-friendly way, but it also negotiated the British derogation to the Temporary Agency Workers Directive. The latter would have the effect of excluding about a half of all agency workers from the protection of the law, by virtue of a 12 week qualifying period. Nevertheless, the actual worker-protective potential of these instruments has greatly benefited from the incremental action of the Court of Justice that, in cases such as Case C-393/10, *O'Brien v Ministry of Justice*,²⁹ greatly expanded the range of work relations covered by the law. In that case the Court adopted an EU definition of 'worker' that is much broader than the UK definitions of 'employee' and, arguably, 'worker' alike.

Working time and paid holidays

- 3.13** With the adoption of the Working Time Regulations 1998,³⁰ implementing the first Working Time Directive 93/104, UK workers finally saw the introduction of a maximum 48-hour working week (averaged over 17 weeks), a daily rest period of 11 consecutive hours, a weekly rest period of 24 consecutive hours, and rest breaks during the working day. While the Directive has received a certain degree of notoriety due to its individual opt-out clause, the TUC suggests that 'there are now 700,000 fewer employees working more than 48 hours a week compared to 1998'.³¹ Equally important, the Directive and the implementing regulations introduced the right to paid holidays, the New Labour government's extension of the number of days paid leave to which workers are entitled being an unusual example of the United Kingdom doing more than the minimum required. Indeed, the Major government had tried

unsuccessfully to block the Directive by legal action in the ECJ, even before it was brought into force.

3.14 As with the other areas of EU law discussed in the previous paragraphs, the ECJ has had a major impact in improving the material protections afforded by the Directive and by the implementing regulations. Leading cases include:

- Case C-173/99, *BECTU* (resulting in paid holiday rights becoming a 'day one' right);
- Case C-131/04, *Robinson-Steele v R D Retail Services Ltd* (resulting in the prohibition of 'rolled-up holiday pay' practices, whereby weekly or monthly wages were deemed to include an element of holiday pay, so that no holiday payments would be made while the workers were on leave); and
- Case C-155/10, *Williams and Others v British Airways plc* (declaring that a broad concept of pay, inclusive of bonuses and other benefits, must be used when calculating the amount of pay workers receive while on holiday).

In 2014, the CBI criticised the ECJ's role in this field, noting that 'Expansive interpretations of the Working Time Directive have allowed the European Court of Justice to redefine key concepts unchecked', while suggesting that 'Finding compromises to fix the problems created by the Court and prevent further expansive interpretations is essential'.³² That will now be possible.

Redundancy and business restructuring

3.15 Since the 1970s, EU law has underpinned UK legislation guaranteeing workers' rights to information and consultation during processes of business restructuring, resulting in collective redundancies and the transfer of undertakings. It has also created a number of important substantive rights, first and foremost the right for workers to retain pre-existing terms and conditions of employment during outsourcing and business buy-out processes. Admittedly, the Coalition Government's zealous stance against 'gold plating' of EU labour rights resulted, in 2014, in a considerable erosion of the protections enshrined in UK statute, notably the significant reduction in the consultation period before redundancy dismissals. As put to the House of Commons by the then Parliamentary Under-Secretary of State for Business, Innovation and Skills, Jo Swinson (now Leader of the Liberal Democrats):

The Government consider that there is scope to improve the regulations by removing unnecessary gold-plating and generally eliminating bureaucracy.³³

Nevertheless, because of the origin of the legislation, it was not possible for the government to reduce the consultation period below a minimum standard required by the relevant EU directives, let alone repeal it entirely. It is not yet clear whether the Swinson amendment is in fact compatible with EU law.

- 3.16** But apart from consultation rights, a major irritant for the Right has been the protection of workers' rights on the transfer of a business, including outsourcing. The point was addressed by the infamous 'Beecroft Report' commissioned by David Cameron in 2011, dubbed as 'sixteen pages of ideological poison'. According to Beecroft, these protections 'can give rise to significant problems' . . . for business.³⁴ Thus:

Such transfers are often associated with outsourcing where it is believed that an external organisation (the transferee) can deliver the service concerned more efficiently and hence more cheaply than the transferor. Here the regulations make it harder for the transferee to reduce costs by reducing the size of the workforce or the level of pay of the transferred workers. These regulations therefore serve to reduce the likelihood of a transfer that would result in greater efficiency or, if a transfer goes ahead, makes it harder to achieve greater efficiency.³⁵

Having identified the poison, there will now be no barrier to it being administered. This is not to deny that there have been problems in the interpretation and application of the law on business transfers. But these latter problems need to be seen in perspective: they relate to legislation that has an important protective function, which operates only as a result of an EU obligation, imposed initially on the Thatcher government.

Information and consultation procedures

- 3.17** Information and consultation rights have been introduced in the UK as a consequence of EU membership, initially to deal with collective redundancies, business transfers, and health and safety at work, while more recently as a set of self-standing rights (Information and Consultation of Employees Regulations 2004, implementing Directive 2002/14/EC, establishing a general framework for informing and

consulting employees in the EU). These rights sit alongside the more traditional collective bargaining processes. Indeed, information and consultation rights not only apply in respect of decisions taken by employers at the national level, but also extend to information and consultation at the transnational level through the medium of European Works Councils (EWCs), again as a consequence of the adoption of the European Works Council Directive 94/45/EC (currently Directive 2009/38/EC).

- 3.18** Consultation rights have been substantially fleshed-out by the Court of Justice, which has interpreted them in the context of the Collective Redundancies Directive as imposing an obligation to ‘negotiate’.³⁶ As such they have the potential to act as a catalyst for collective bargaining processes in sectors and workplaces dominated by recalcitrant employers, unwilling to recognise unions voluntarily. While it is fair to say that information and consultation procedures have never quite succeeded in piercing the veil of scepticism and outright resistance of many trade unionists, the failure is again due in no small part to the miserable efforts of New Labour to block and then dilute the Directive, before implementing it to fail. The EWC procedures have fared better, being tied to traditional union structures. They also offer the only genuinely transnational labour law so far implemented anywhere in the world.

Conclusion

- 3.19** At a time of rampant transnational corporations this seems hardly the best time to be putting in jeopardy any legal tools that provide a voice for workers, however inaudible that voice may be. But this is not all that will be put at risk by Brexit. UK workers’ rights have been shaped by some four decades of EU regulatory intervention in the labour law sphere, including by means of favourable and worker-protective ECJ case-law (though this is not to deny that there have been set-backs in the Court, some of which we assess in the following sections). While EU labour law directives tend to provide minimum standards in a limited number of substantive areas of regulation, it is fair to say that they have succeeded in establishing a minimum floor of rights that even determined Conservative-led administrations, have been unable to dismantle. It is implausible to think that the raft of workers’ rights currently in place would have been introduced by Thatcher, Major, Blair, Brown or Cameron without the demands of EU membership.

3.20 Apart from the fact that none of the foregoing would have been enacted voluntarily, it is noticeable that in areas where UK labour rights are not anchored to any corresponding EU provision, for instance, in the areas of pay, collective bargaining, unfair dismissal, or industrial action, domestic standards have either been eroded or are below the European average level of protection. It is also noticeable that while EU standards, where existent, are designed so that willing Member States may improve on them, successive UK governments have resisted any temptation to do so, more recently engaging in highly political crusades against ‘gold-plating’. It is not defeatist to suggest that even if future progressive majorities may decide to boost domestic labour standards, they could do so while EU labour standards apply as an ongoing safety-net. Indeed, the risk of neo-liberal majorities driving down standards in the absence of any EU safety net will be seen by some to greatly outweigh the potential and periodical benefits of a progressive swing in the domestic legislative pendulum.

Box 3 – EU membership and workers’ rights

Key points

- **UK labour law as we know it depends heavily on EU labour law directives that shape domestic labour rights and ultimately ensure their effectiveness and protection.**
- **UK labour law has also been shaped by the positive influence of the Court of Justice of the EU that has often blown life into EU directives by interpreting them in a way that was favourable to UK workers.**
- **While most of EU labour law is implemented and incorporated in domestic law, some of it is premised exclusively on supreme EU law and Court pronouncements.**
- **It is noteworthy that the few areas of UK labour law where standards are more or less on a par with those of our European partners are those areas shaped by EU law.**

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- **On the contrary, those areas characterised by the absence of EU legislation (e.g. unfair dismissal, industrial action . . .) tend to fall well below comparable European standards.**
- **EU labour law has acted as a minimum floor of rights against the deregulatory ambitions of many Conservative-led governments, old and new.**

‘British jobs for British workers’?

Introduction

- 4.1** EU law facilitates the free movement of workers and self-employed persons and, under certain conditions, of students, retirees, and other citizens of EU Member States.³⁷ British workers have taken advantage of the freedom to move and even settle in other EU countries in order to work or provide services, on a permanent or temporary basis. The reverse is also true, with EU workers moving to or settling in the UK for work related reasons. The Office for National Statistics (ONS) estimates that there are around 3.18 million people born in other EU countries living in the UK, with approximately 2.2 million of them working.³⁸ It also estimates that approximately 900,000 UK citizens reside permanently in other EU countries,³⁹ with their right to do so under EU law evaporating with Brexit.
- 4.2** The central regulatory principle shaping free movement of persons, and free movement of workers in particular, is the equal-treatment principle, that is to say the idea that workers from other EU Member States have to be treated in the same way as domestic workers. However, a problem can arise in the context of businesses moving from one country to another to provide services, while taking their own workforce along. Under these ‘free movement of services’ schemes, it can sometimes be the case that the labour standards of the receiving Member States may be set aside if they are not incorporated into universally applicable labour standards or collective agreements. This presents a major problem for countries like the UK, with voluntary and non-binding collective agreements, and with no labour inspectorate.

Freedom of movement

- 4.3** The EU has repeatedly stressed the idea of the ‘indivisibility’ of its four market freedoms.⁴⁰ It is therefore clear that any substantial access to the EU single market post-Brexit would require an equally substantial acceptance of the ‘free movement of persons’ principle. Data suggest that access to the single market is largely beneficial to the UK economy and to UK employment.⁴¹ The UK exports approximately 39% of the services and 47% of the goods it produces to the rest of the EU.⁴² In 2015, the UK ran a surplus in its trade with the EU in professional business, digital, and creative services (totalling £9.8 billion).⁴³ But if membership of the EU has been beneficial to the UK economy, this has not always translated into fair and equal distribution of benefits for all workers (whether UK citizens or not).
- 4.4** To be clear, the single market project is not a value neutral one: it was and remains designed around the objective of anchoring the European integration process to free market values. Also to be clear: it is impossible, at this stage, to make accurate predictions about the long-term effects of Brexit on the British economy, and on society at large. We can point to epochs in British history where levels of inequality were much, much lower than they are at the point of Brexit. Paradoxically these include the 1970s, a decade which is misremembered and forgotten as the decade of greatest equality in British history; it is no coincidence that it was also the decade of greatest trade union power and influence. The decline in equality since then is not, however, a result of EU membership, but the result of home grown policies of Thatcherism minted in London and exported to rather than imported from Brussels.⁴⁴
- 4.5** Still less is the growth of inequality likely to have been caused by the free movement of workers from other EU Member States since 1973, or since the expansion of the EU to include ten additional Member States in 2004, however badly handled and hubristic many regard that process to have been. We accept that data on migration is contestable and the matter the subject of rancid and poorly informed debate. However, the most comprehensive study of the impact of EU/EEA migrants on the UK labour market was carried out by the Migration Advisory Committee (MAC), and published in September 2018. The MAC’s report – *EEA migration in the UK: Final Report*⁴⁵ – concluded that there was ‘little evidence of substantial impacts’ of EEA immigration on

the ‘overall opportunities of UK-born workers’ or on ‘aggregate wages’. Although it did find ‘some evidence that lower-skilled workers face a negative impact while higher-skilled workers benefit’, the ‘magnitude of the impacts’ were said to be generally small’.

- 4.6** To fully appreciate these impacts, the MAC looked at the period from 1993 to 2017, over which time
- average earnings for the lowest-paid 5% of UK workers rose by 55%, and
 - average earnings for the lowest-paid 10% of UK workers rose by 46%.

Using economic modelling, the report estimated that, without European migration into the UK during that period, that rise would have been, respectively, around 5.2% and 4.9% higher.⁴⁶ The report also concluded that other factors had a greater impact on wages. All workers having done badly since the financial crisis, lower-skilled workers have done marginally better due to the minimum wage rising faster than average earnings:

Real wages for all groups grew before the financial crisis but then fell and are still around 6 per cent below their pre-recession peak. Some have argued this has been the worst decade for real wage growth in 200 years.⁴⁷

The major cause of that, however, has been the financial crisis and the austerity policies pursued by the Coalition government.

‘British jobs for British workers’

- 4.7** Free movement of workers has been the elephant in the room – and at times a toxic skeleton in the closet – during much of the Brexit referendum debate, including, from time to time, within the labour and trade union movement. It is a widely shared view that large and uncontrolled influxes of migrant workers from other EU Member States undercut the local workforce and drive down hourly wages and the going rates of pay, especially in the construction sector. That is a concern that has its origins in the expansion of the EU in 2004 to include ten East European countries, and the failure of the New Labour government to prepare for the unimpeded movement of an unknown number of workers, at a time when Germany had introduced transitional restraints.
- 4.8** It is unknown whether the Home Office’s lack of preparation was welcomed by the Treasury as increasing the labour supply and further

containing wage costs. Claims that British jobs were being lost to foreign workers were fuelled by a number of badly received speeches made by Gordon Brown, keen to assert his Britishness on assuming office as Prime Minister. In these speeches, Brown let the genie out of the bottle with toxic rhetoric about ‘British jobs for British workers’, giving visibility as well as unintended legitimacy and licence to the claims of the Far Right. Perhaps predictably, it was not Polish or Lithuanian workers whose presence in the United Kingdom ignited the fire, but the employees of Italian sub-contractors who had won a contract for a construction project at East Lindsey, a complex dispute to which we return.

- 4.9** Gordon Brown’s intervention was made in three extensively reported speeches delivered in 2007, at the GMB, TUC, and Labour Party Annual Conferences, respectively. He is reported as having said that:

It is time to train **British workers for the British jobs** that will be available over the coming few years and to make sure that people who are inactive and unemployed are able to get the new jobs on offer in our country.

(GMB)

But when people ask me about this world of fast moving change, of greater opportunity and yet greater insecurity, and they ask: can we, the British people, in this generation, meet and master the new challenges and still achieve our goals of full employment, defending and strengthening public services, ensuring hard working people in Britain are better off in living standards, in pensions and in services, my answer is that if we work together and raise our game, if we do not resist change but embrace it as a force for progress and if we equip ourselves with investment, science, enterprise and flexibility, and most of all if we upgrade our education and skills, then we can not only meet and master these realities of global change but also ensure more British jobs, higher standards of living, and better public services, including an NHS that improves every year, free at the point of need.

(TUC)

Later that year at the Labour Party Conference, Brown referred to ‘drawing on the talents of all to create **British jobs for British workers**’.⁴⁸

- 4.10** These remarks were condemned at the time, Brown suffering the indignity of being presented at the Despatch Box by the then Leader of the Opposition with National Front literature projecting the same message.

Brown was also attacked for his fundamental misunderstanding of EU law, and free movement of workers in particular.⁴⁹ But having fed this monster, Brown is now campaigning vigorously against ‘No-Deal Brexit’, without reflecting on any potential contribution to Brexit by the government he led.⁵⁰ Also relevant were his government’s minimalist labour law reforms, which as the East Lindsey dispute revealed, meant that British workers were not entitled to the full protections against undercutting that EU law provided under the Posted Workers Directive. The latter had the potential to be much more effective in protecting workers rights where regulatory standards were higher and regulatory methods more sophisticated.

More ‘British jobs for British workers’

4.11 In a largely overlooked paper, Karl Marx wrote in 1866 that:

The only social power of the workmen is their number. The force of numbers, however, is broken by disunion. The disunion of the workmen is created and perpetuated by their unavoidable competition amongst themselves.⁵¹

The dispute at East Lindsey was a classic example, driven as it was on the high octane fuel of Prime Ministerial rhetoric. According to the *Guardian* report,

A series of unofficial strikes broke out across Britain today over plans by a major oil company to give jobs to construction workers from Portugal and Italy. The contractors were to work on the giant £200m Lindsey Oil Refinery at North Killingholme, Lincolnshire. Workers at refineries and power stations in various parts of the UK walked out, some holding placards quoting the words of Gordon Brown: ‘British jobs for British workers’. The wildcat strikes mark the latest in a series of protests over the use of foreign rather than domestic labour by large companies in the UK.⁵²

4.12 To add to the Prime Minister’s discomfort, the *Guardian* also reported that:

In Lincolnshire, several hundred protesters gathered in a car park opposite the sprawling Lindsey refinery. Clutching placards and banners, two of which read ‘Right to Work UK Workers’ and ‘In the wise words of Gordon Brown UK Jobs for British Workers’, they listened as union leaders called on them to stand together in their protest.⁵³

(Brown will have been familiar with the biblical aphorism that ‘for whatever a man sows, this he will also reap’.)

The background to the dispute was the decision by Total (a French owned company which owned and operated the Lindsay Oil Refinery) to install a new de-sulphurisation facility at the site. For this purpose, a number of sub-contractors were engaged, including an Italian company, which unlike another sub-contractor, insisted on using its own workers rather than workers locally sourced.⁵⁴

4.13 According to the ACAS report of the dispute, these arrangements alarmed the unions at the site for two reasons. The first was that ‘IREM planned to employ overseas labour only. The unions believed that UK-based workers had the skills and experience to work on the project for IREM and should be given the opportunity of applying for the jobs’.⁵⁵ And the second was concerns that IREM was not complying fully with the National Agreement for the Electrical Construction Industry (NAECI Agreement), with which all contractors undertook to apply, the unions highlighting the arrangements for breaks and the lack of wage transparency. The latter concern broadened the dispute from freedom of movement to the inadequacies of EU labour law, and specifically the Posted Workers Directive, which required employers posting workers (as in this case) to respect the minimum terms and conditions of employment laid down by law in the host country.⁵⁶ There was no obligation to follow collective agreements unless they had been declared universally or generally applicable, procedures unknown to Britain’s primitive labour law.

4.14 Adding to the toxic atmosphere was a particularly unhelpful decision of the CJEU in the *Laval* case on 18 December 2007 dealing with a similar case from Sweden. In that case the Court held that industrial action by Swedish unions to enforce collective agreements on a Latvian contractor was a breach of the latter’s freedom under the EU Treaty to provide services. As in the United Kingdom, there was no procedure in Sweden for declaring collective agreements universally or generally applicable. The unofficial industrial action at East Lindsey and elsewhere was thus probably unlawful under EU law (but it would have been unlawful under British law in any event), though no legal proceedings are known to have been taken as a result. The significance of the *Laval* case in this context was to reinforce the sense that IREM was behaving perfectly lawfully, and that it was fully entitled to pay below the NAECI Agreement. The ACAS inquiry established, however, that IREM had committed to respecting the terms of the latter and had applied for membership of the employers’ federation.⁵⁷

Coercion, intensification and/or immigration?

- 4.15** The East Lindsey dispute is important for reminding us that the toxic rhetoric of ‘British jobs for British workers’ has two dimensions: the first is the free movement of workers coming to the United Kingdom of their own volition; the other is foreign businesses bringing foreign workers to do jobs in the United Kingdom. Brexit will solve neither ‘problem’. In certain sectors, there is a dependence on foreign labour because there is a skills shortage in the United Kingdom, which has largely given up responsibility for labour planning and skills training.⁵⁸ Labour is supplied by the ‘labour market’ (despite the commitment in international law that ‘labour is not a commodity’),⁵⁹ and the labour market hitherto has been European (and occasionally global) the United Kingdom being a parasite on/beneficiary of the investment in education and training in other – sometimes even less prosperous – EU Member States (and third countries), on whose citizens British employers now rely. If economic development is not to stand still, EU workers denied entry to the United Kingdom will have to be replaced.
- 4.16** There are only three ways by which that labour could be replaced. The first is by coercion, and the introduction of wartime controls on the movement of labour either directly, or indirectly by even more authoritarian use of the social security system to compel people to work. Neither seems attractive. The second is by the intensification of work, with fewer people doing more hours each day. That may have attractions in some sectors where there is a chronic problem of a shortage of hours needed to earn a decent wage. But it is unlikely to be a solution in all sectors, particularly in skilled and/or seasonal trades. So thirdly, we are back to immigration, with talk of an Australian system. What these superficial claims overlook, however, is that countries like Australia also have chronic labour shortages for unskilled as well as skilled labour. These shortages are met in part by visa arrangements for short term entry that are characterised by the gross exploitation of vulnerable foreign workers.⁶⁰ That is not very attractive either.
- 4.17** So far as businesses such as IREM bringing workers to work on contracts are concerned, this too will be affected by Brexit. As the ACAS East Lindsey report pointed out:

The freedom to provide services, including construction work, in other Member States of the European Union is a fundamental principle guaranteed by Articles 49 and 50 of the EC Treaty. Restrictions based on nationality or residence requirements are prohibited.⁶¹

But although this practice will no longer be governed by EU law after Brexit, it is implausible to believe that it will not be replicated in free trade agreements in the future. In the context of globalization, it is not unlikely that foreign businesses (investors/contractors) will be entitled to tender for contracts, and that they will be able to use their own staff when doing so, or staff supplied by foreign labour supply companies, perhaps under the free movement paradigm exemplified by the GATS Mode 4 arrangements, keenly advocated in some quarters as a post-Brexit alternative to the existing posting practices.⁶²

- 4.18** The legal basis for the contracting will thus be different – an FTA rather than the EU treaties – but in practice it will operate in just the same way, albeit with one crucial difference. The PWD will not apply, and there will be no equivalent obligation enforceable against employers to ensure that foreign workers posted to work are employed on terms comparable to those applying for domestic workers. It is true that the PWD was revealed in the East Lindsey dispute to compound the problem of free movement by facilitating ‘social dumping’ practices in industrial relation systems such as the British one. Here collective agreements set a going rate of pay that is above the statutory minimum rate, but in the absence of a mechanism or formal procedure for declaring collective agreements universally applicable or to have universal application. As we will discuss below, that problem has been addressed in part by major reforms to the PWD. Ironically these would need to be implemented in the United Kingdom after Brexit if the problems of East Lindsey are not to be repeated. But that is not likely to happen.

Conclusion

- 4.19** The United Kingdom is a country of great income inequality and degraded home grown labour standards. These conditions were not created by the EU, and are not a consequence of EU membership. To the extent that the lowest paid have made the greatest sacrifice during austerity, this is a consequence of deliberate regulatory choices of British governments, not the free movement of EU workers. At best the latter has facilitated low regulatory standards; it has not caused them. Foreign workers are the convenient scapegoats for egregious government policies that have perpetuated inequality and poor conditions, which in turn have led to Brexit and which in turn Brexit will not solve. When Marx wrote about the duty to ‘look carefully after the interests

of the worst paid trades . . . rendered powerless by exceptional circumstances',⁶³ he was not referring to British workers only, nor that there should be 'British jobs for British workers', in the words of a former Prime Minister.

- 4.20** The Posted Workers Directive has since been reformed.⁶⁴ Moreover, in *A Manifesto for Labour Law* (2016) and *Rolling out the Manifesto for Labour Law* (2018), the IER proposed changes that would eliminate the minor but real risks that free movement of workers (and free movement of services/the posting of workers) would seem to impose on the wages of the lowest paid. In particular we suggested the establishment of a statutory process that would guarantee the universal applicability of the terms of employment set by collective bargaining to the entire sector, that is to say to all workers, whether UK-born or not, and all businesses (whether UK-based or not) operating within all industries of a particular segment of the economy.⁶⁵ That would raise wages for everyone, and along with other economic levers would help reduce inequality of income and wealth. The target of our wrath should be successive British governments, not the human shields they have so cynically deployed.

Box 4 – 'British jobs for British workers'?

Key points

- **Free movement of workers (FMW) is one of the fundamental freedoms on which the functioning of, and (full) participation to the single market is premised.**
- **FMW is based on the idea that all EU workers can move, reside, and work freely in any other EU member state and be treated on a par with domestic workers (non-discrimination/equal treatment principle).**
- **Occasionally though FMW has raised the fear that a large influx of labour may drive wages down.**
- **Robust statistical evidence suggests that FMW has had a negligible impact on even the lowest paid domestic workers and no overall impact as a whole.**
- **From time to time, free movement of services, and posting practices, have raised genuine 'social dumping' concerns, partly because**

of flaws in the old Posted Workers Directive, and partly because of the weakness of our domestic labour market arrangements.

- The new Posted Workers Directive, and the introduction of the reforms contained in the IER publication *Rolling out the Manifesto for Labour law*, would go a long way towards resolving these concerns.

'No Deal' and workers' rights

Introduction

- 5.1** There should be no doubt in anybody's mind that a 'No-Deal Brexit' represents the ultimate ambition of those who would love to dismantle what is left of UK labour and employment law after a full decade of deregulatory reforms led by the Lib-Dem/Conservative coalition government first, and more recently by successive Conservative majorities. As noted in 2011 by venture capitalist Adrian Beecroft in his report to the then Coalition government '[t]here is no EU concept of "unfair" non-discriminatory dismissal, so there are no other EU constraints on what the UK can do in this area'.⁶⁶ EU labour law is thus rightly perceived as a 'constraint', limiting the deregulatory ambitions of policy makers seeking to deal a final blow to UK workers' rights. Where UK labour rights are underpinned by EU directives, then deregulation can only go as far as the minimum harmonisation requirements contained in the directives themselves.
- 5.2** But in the absence of EU instruments, as for instance in the areas of dismissal or strike action, it is possible to adopt measures such as the Trade Union Act 2016, which has rendered the exercise of the right to strike virtually impossible in many sectors where trade unions have a significant presence, or doubling the qualifying period for unfair dismissal while capping compensation to the employee's annual salary. While in the short term any government would want to limit the impact of a 'No-Deal Brexit' by retaining most of the current, EU-based, labour rights on the statute book, there is no doubt that in the longer run, competitive pressures (fuelled in part by neo-liberal free trade agreements) and deregulatory ambitions would combine to produce the perfect storm for British employment legislation. The present section discusses, in outline, both the short- and longer-term consequences of a 'No-Deal Brexit' on workers' rights in Britain.

Avoiding a cliff-edge – envisaging a slippery slope

5.3 As noted earlier, upon the Brexit date, the immediate consequence of the coming into force of The European Union (Withdrawal) Act 2018 will be the repeal of the European Communities Act 1972, though this will also automatically convert all EU employment law as it stands before Brexit into British law. So, in the short term, British workers would continue to enjoy the same rights and protections previously granted by EU law. In anticipation of a ‘No-Deal Brexit’, the government has published a series of notices on how to prepare, including one on labour rights.⁶⁷ In the event of ‘No Deal’, the government has identified two areas that will be affected:

- employees who work in some EU countries, employed by a UK employer, may not be protected on the insolvency of the employer; and
- it will not be possible to make a new request to set up a European Works Council or information and consultation procedure.

5.4 It is also clear, however, that free movement of workers would soon come to an end, and so would the UK’s tariff free access to the EU single market, which will be regulated instead by the rules and principles set by the World Trade Organisation. The Government’s ‘No Deal’ guidance for EU/EEA/Swiss citizens seeking to stay in the UK for more than 3 months after Brexit date is that they should apply for a right of entry under the new European Temporary Leave to Remain immigration category.⁶⁸ It is currently envisaged that, from 2021, a new ‘skills based’ immigration system will fully replace free movement rules and create a single route for all nationalities.⁶⁹ It goes without saying that, in these turbulent times, all these policies are very much in flux. In all likelihood these arrangements would be reciprocated by EU Member States, though practices may vary from country to country as, under the EU Treaties, EU policies on the admission of third-country nationals

shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.⁷⁰

5.5 As for British goods and services accessing the single market, in the absence of any ad hoc side deals, normal WTO rules will apply. This means that after Brexit ‘cars would be taxed at 10% when they crossed the UK–EU border. And agricultural tariffs would be significantly higher, rising to an average of more than 35% for dairy products’.⁷¹ The British

government has recently suggested that in the event of a ‘Hard Brexit’ it would be ready to cut import tariffs unilaterally to minimise the impact of No Deal,⁷² although it is unlikely that such a move will be reciprocated by the EU. This would inevitably have negative repercussions for the economy, and depending on the circumstances the temptation for any post-Brexit British governments to gain a competitive advantage by forfeiting regulatory alignment and reducing labour and other regulatory costs should be considered as a serious probability and a substantial threat to UK workers’ rights.

5.6 It is unclear whether, in the longer term, the present or successive governments would want to retain the *social acquis* inherited as a result of EU membership. It is likely that, even in the event of a ‘No-Deal Brexit’, successive UK governments will want to conclude a trade deal with the EU, which would have to be negotiated outside the scope of the TEU, Article 50, but would most likely end up requiring some form of weak non-regression clause and a tokenistic respect for international labour standards, similar to those contained in the Withdrawal Agreement. In any case we believe that ‘No-Deal Brexit’, or even a Free Trade Agreement with weak commitments in terms of avoiding any future regulatory divergences between EU and UK labour standards (such as the ones currently outlined in Annex 4 of the Withdrawal Agreement) could lead, to

- the ossification of British workers’ rights;
- jurisprudential divergence between the British and EU courts; and
- the eventual erosion of British workers’ rights.

Ossification of workers’ rights

5.7 First and most obviously, Brexit will lead to an ossification or fossilisation of British labour law in the sense that any new developments that take place in the EU will obviously not apply in the United Kingdom (including those parts – Scotland and Northern Ireland – that voted Remain). It is true that European social policy has stalled since 2008, with reports of its death in the face of new liberal economic principles of governance; the global financial crisis and the currency crisis in the Eurozone; and free trade agreements.⁷³ All of these developments have put pressure on labour standards in Member States, which are being undermined not by using the legislative power of the Union, but by administrative power. The latter includes powers under the TFEU, Title

VIII, which gives the Commission scope to interfere in the economies of individual countries, as well as powers under financial solidarity agreements which typically have labour law regression conditions attached to them.

5.8 Yet there are nevertheless suggestions that something is beginning to stir in the Brussels sarcophagus, with the adoption, in 2016, of the new European Social Pillar initiative, which seeks to build upon existing social policy with a new framework of rights.⁷⁴ There are a lot of reasons to be sceptical or critical of this initiative. Nevertheless, the 20 principles in the agreed text make a number of commitments, including:

- Regardless of the type and duration of the employment relationship, workers are to have the right to fair and equal treatment regarding working conditions, access to social protection and training.⁷⁵
- Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts, while ‘any probation period should be of reasonable duration.’⁷⁶
- Workers have the right to fair wages that provide for a decent standard of living. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his/her family . . .⁷⁷

Whatever happens in relation to the implementation of this agenda (which should be made much easier by the absence of the United Kingdom which has historically been a negative force in the development of European social policy), it will not apply in the United Kingdom after Brexit.

5.9 At the time of writing, the EU is in the process of adopting or implementing three new directives: Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, the New Work-Life Balance Directive 2019/1158, and a new Whistleblowers’ Directive.⁷⁸ As noted earlier, these instruments would introduce substantial benefits for British workers. Directive 2019/1152 in particular, would confer additional rights to ‘on-demand’ and zero hour workers, including a duty on the part of the employer to inform workers of

- (i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;

- (ii) the reference hours and days within which the worker may be required to work;
- (iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation.

Provision is also made for workers to be compensated by the employer for the cancellation of shifts, a demand made for some time by workers on zero hour contracts.

5.10 Moreover, Member States would be required to adopt effective measures to prevent the abuse of zero hour contracts. Under Article 11 of the Directive, such measures could take the form of limitations to the use and duration of such contracts; a rebuttable presumption of the existence of an employment contract or employment relationship with a guaranteed amount of paid hours, based on hours worked in a preceding reference period; or other equivalent measures that ensure the effective prevention of abusive practices. This contrasts with the meaningless dithering around inadequate proposals such as those contained in the Taylor Review.⁷⁹ Instead of ‘limitations’ or ‘rebuttable presumptions’ to a contract with regular hours under EU law, British workers under the Taylor review would be given only a ‘right to request’ a more predictable contract, that ‘right’ being subject to a 26 weeks’ qualifying period.⁸⁰ But as noted by the TUC, ‘the ‘right to request’ is no right at all. It provides workers with the option to ask, but no right to receive’.⁸¹

Jurisdiction of the CJEU

5.11 The foregoing discussion of the ossification of standards suggest that there will be a passive regression of workers’ rights. The changing relationship with the CJEU (one of the prizes of Brexit for its more rabid supporters) will create other forms of regression. The first and most obvious is the lack of access to the CJEU, to which it will no longer be possible to take complaints that the UK has failed properly to implement a Directive, or seek a preliminary ruling on the meaning of law transposed to give effect to a Directive. This includes complaints that EU-derived employment rights are in breach of the EU legal instruments on which they are based, which will now be rights under British law, and it will be for the British courts to decide what they mean. As explained by the UK Supreme Court in the *Miller* case: ‘the Court of Justice will no longer have any binding role in relation to their scope or interpretation’.⁸²

- 5.12** This is a significant loss in view of the importance that access to the Court has been in developing British implementation of European social policy, and giving domestic legislation an uplift. As noted earlier, there are a number of areas where ECJ intervention has helped to raise the standard of British law, including equality law, working time, and holiday pay, to which we might add redundancy consultation and the transfer of undertakings. Post-Brexit, the substance of these rights will be determined by the British courts whose anti-worker decisions led to many of these successful challenges in the European Court. Brexit thus means more power for the British courts and more opportunities for British judges to protect workers' rights. There may be some labour lawyers who are content as a result and contemplate British judges setting higher standards. If so, they have a poor grasp of legal history.
- 5.13** The likely result of losing this access is the gradual development of a two tier system of employment law in which British–EU origin rights are likely, as a result of the narrow interpretations of British judges, to fall behind those operating in the EU27. This will be reinforced by a second consequence of the removal of the Court's jurisdiction, which is that the British courts will cease to be bound by the Court's jurisprudence, a point that needs some clarification. Thus CJEU's decisions issued before Brexit will be binding on British courts except the Supreme Court (or the High Court of Justiciary in Scotland), by which they can be overruled. But CJEU decisions issued post-Brexit will have no binding effects whatsoever on the British courts.⁸³ The British courts will be free to take these decisions into account and it is to be hoped they may well emerge as having persuasive authority in the interpretation of British law of EU origin. Nevertheless, CJEU decisions made after Brexit on directives which have been implemented in the UK will have no binding authority.
- 5.14** EU law in force in the UK at the time of Brexit will thus be static, subject to the stuttering false starts of the British courts, in contrast to its dynamic development for the remaining Member States. A good recent example of a CJEU decision from another country with potentially important implications for British workers is the case brought by the Spanish trade union CCOO against Deutsche Bank about working time,⁸⁴ which drew breath-taking responses from employers' lawyers in the United Kingdom:

This ruling is remarkable on various accounts, including the far-reaching involvement of the ECJ in day-to-day HR practices and its direct effects on such practices, notwithstanding the alleged

fragmentary legislative competences of the EU institutions in the field of employment law.⁸⁵

In this case decided on 14 May 2019 the Court held that employers ‘must keep a record of all hours worked by their workers each day, in order to ensure compliance with the rules on maximum working time and rest breaks’. This is a crucially important decision on a matter of fundamental importance to the enforcement of the Working Time Regulations, which may have implications for workers’ rights other than working time.⁸⁶ Ground breaking decisions of general application such as this will cease to apply in the United Kingdom.

Erosion of EU-based standards in UK

5.15 Ossification because the UK will no longer be bound to implement EU legislation, and stagnation because of the loss of access to the CJEU are insidious threats to workers’ rights: slow if seemingly painless. As also already suggested, however, given the right wing populism driving the Brexit process and the new economic architecture anticipated by its authors, there is also a risk of the erosion of EU-derived employment rights. Despite promises from the May government about protecting workers’ rights, the ambitions of government since 2010 have generally been in the direction of deregulation. There is a high risk in the UK of amendment to legislation, if not repeal, in response to pressure from business. Thus:

There is nothing to stop a UK government chipping away at EU origin employment rights, while retaining the basic structure. What is to stop the government restoring the restrictions on holiday pay that were ruled unlawful in the BECTU case? And what is to stop them reinstating the limit on compensation in discrimination cases? The answer is nothing.

After BREXIT this will all be British law, albeit EU origin British law, and as a result can be changed with impunity. The government can keep the temporary agency workers’ regulations, but respond to business demands that they should provide even less protection. They can keep redundancy consultation, but limit the obligations on employers.⁸⁷

5.16 The erosion of EU-derived rights was a process already underway when the Conservative-led Coalition government from 2010 to 2015 reduced the mandatory redundancy consultation periods.⁸⁸ For some on the Tory right this was by no means enough, with Tory concerns

highlighted in two documents, which provide some insight into the post-Brexit direction of travel. The first is the Beecroft Report to which we have already referred, Beecroft reporting to Cameron about the need to deregulate labour standards, and clearly frustrated in his ambitions by EU law then in force. But a number of areas in his sights which Brexit would allow to be revisited include (a) exemptions from some EU retained law for small businesses; (b) compensation levels in discrimination cases; (c) the operation of the Transfer of Undertakings Regulations; and (d) the Temporary Agency Workers Regulation. So far as the last of these is concerned, Beecroft had recommended that:

The Government should decide if the likely consequences, including infraction, of not implementing the Agency Workers Directive before the deadline of the end of 2011 are worth bearing in order to avoid the damaging results of the Directive.⁸⁹

- 5.17** Perhaps even more alarming is the publication *Britannia Unchained – Global Growth and Prosperity*, by a group of five Tory MPs dubbed by the *Evening Standard* to be from the ‘class of 2010’.⁹⁰ All five – Kwarteng, Patel, Raab, Skidmore and Truss – are now ministers in Johnson’s government, the most senior being Raab as Foreign Secretary. This publication attracted some media notoriety for a passage attributed to the book in which it is claimed that:

The British are among the worst idlers in the world. We work among the lowest hours, we retire early and our productivity is poor. Whereas Indian children aspire to be doctors or businessmen, the British are more interested in football and pop music.⁹¹

An interview with the *Guardian*’s Andy Beckett in 2012 gives us a flavour of Raab’s views. Apparently he thinks that ‘current employment law offers “excessive protections” to workers’, Beckett reporting also that:

Last year, for example, Raab wrote a paper for the Centre for Policy Studies (CPS) – since the birth of Thatcherism one of the radical right’s fiercest think tanks – urging that ‘the definition of fair dismissal should be widened . . . to encompass inadequate performance . . . [This] would help employers get the best from their staff’. The paper also argued for exempting small businesses from paying the minimum wage for under-21s, the already less-than-lavish hourly sum of between £3.68 and £4.98.⁹²

- 5.18** New dangers for post-Brexit have been highlighted by reports in the Murdoch press that some ministers are planning to remove the restrictions on working time and paid holidays in the Working Time Directive,⁹³

a long-standing irritation of the neo-liberals. Ironically the abolition of working time limits is being presented as a liberation for workers: an initiative to boost wages by restoring the right of workers to work unlimited overtime, wilfully ignoring or wholly ignorant of the British opt-out from the 48-hour limit on the working week. And wilfully ignoring too that the problem of working time for many workers is the shortage of hours to earn a decent wage, rather than the denial of overtime in excess of 48 hours. It is worth noting that the new Prime Minister has gone on record as suggesting that

stuff such as the working time directive . . . the Data Protection Act . . . and the solvency II directive, many directives and regulations emanating from Brussels have, either through gold-plating in this country or simply because of poor drafting or whatever, been far too expensive . . . They are not ideally tailored to the needs of this economy.⁹⁴

Conclusion

5.19 It should be clear from the previous paragraphs that a ‘No-Deal Brexit’ presents a clear and present danger for UK labour law as we know it. Across much of the field currently occupied by EU law, British law will fossilize, it will lose the dynamic input from the CJEU, and it will be at risk of erosion and repeal by a new breed of ideologues, many of whom worship at the altar of Margaret Thatcher. As reported by the *Evening Standard*, their vision for Britain is that

the UK had to raise its work ethic towards that of South Korea, Singapore and Hong Kong, rather than the office and factory culture in struggling European nations, or risk slipping into grim decline with falling living standards. ‘Britain will never be as big as China or Brazil, but we can look forward to a new generation, ready to get to work,’ the MPs said. ‘If we are to take advantage of these opportunities, we must get on the side of the responsible, the hard working and the brave. We must stop bailing out the reckless, avoiding all risk, and rewarding laziness’.⁹⁵

5.20 We would be ignoring the many signs sent to us by leading exponents of the British New Right at our own risk. A ‘No-Deal Brexit’ would probably damage the economy, though it is unclear to what extent. But it is certainly clear that it would present a golden opportunity for the advocates of neo-liberalism to claim that a combination of competitive pressures on the economy and of a renewed and aggressively deregulatory vision of society demand the removal of anything remotely stifling economic performance and protecting workers. Judging from the old

blueprint contained in the Beecroft Report and elsewhere, expect rules on transfer of undertakings, discrimination compensation, collective redundancies, working time, and agency work to be the first victims of this new 'red tape' challenge. More would follow soon.

Box 5 – 'No Deal' and workers' rights

Key points

- A 'No-Deal Brexit' represents clear and present danger for workers' rights.
- While in the short term any sensible government would want to avoid a regulatory cliff-edge and maintain domestic labour law as it is, in the medium term deregulatory temptations would most likely prevail and lead to the progressive dismantling of British labour statutes.
- It is a well known fact that the New Right has always seen EU labour law as a major hindrance to its ambitious deregulatory plans in the labour sphere. The Beecroft Report offers a clear example of such nefarious aspirations.
- Future progressive governments could of course reinstate all rights lost, and even add to them. But this could also be done while maintaining a strong link with the EU social acquis.
- In case of Brexit (not just 'Hard-Brexit'), expect a relentless process of ossification, stagnation, and erosion of UK labour rights.

Free trade agreements and workers' rights

Introduction

- 6.1** It would be quite wrong to see Brexit as being about isolationism. One of the ambitions of the New Right in withdrawing from the EU is for new political alignments. The aim is for an English speaking union across the Atlantic, rather than a largely English speaking union across the Channel. These new alignments will be cemented with free trade agreements, which do not completely displace the EU, with which we will continue to have different kinds of trade agreements. If the Right

wins the battle for Brexit, this will be the reality which the Left will have to deal with – the replacement of one form of ‘social-market’ based capitalism with a more rapacious, ‘free-market’ based form of capitalism. With the United Kingdom as the junior-partner in the relationship with a country in which progressive politics have been crushed by law, the struggles of the Left will be even more formidable than is currently the case.

- 6.2** In cementing the post-Brexit political re-alignment, free trade agreements are designed to facilitate foreign investment and foreign imports, which in the case of a UK–US FTA will mean an even greater visibility of American businesses, and an even greater availability of US produce. This will present two problems, in addition to the dictation of terms of the agreement by the stronger party, which at the moment is unlikely to be the United Kingdom. The first will relate to workers’ rights in a country which no longer has the no doubt far from perfect benefit of the EU safety net. What workers’ rights will be contained in a UK–US FTA negotiated by the Hard Right and Trump? And the second is constitutional, Brexit being driven in part by the need to reclaim sovereignty. How sovereign will our Parliament be following a US driven FTA?

FTAs and the USA

- 6.3** It is of course impossible to predict what a UK–US FTA would say about workers’ rights. But before addressing that uncertainty, there are two others. The first is the uncertainty of whether and if so when a free trade agreement will be negotiated and implemented. Comprehensive free trade agreements notoriously take a long time to conclude, with many areas of contestation likely to arise in negotiations between the two parties. In this case, it has been suggested that the agreement could be developed dynamically on a sector by sector basis, leaving the more contestable issues until the end. Although suggested by a US government representative on a visit to London in which ‘No-Deal Brexit’ was warmly applauded, it is a suggestion that has been met with scepticism, doubts being expressed about whether it would be a generally acceptable approach in the US.
- 6.4** The second question is whether there would be any appetite for including workers’ rights in a UK–US free trade agreement, the idea of doing so appearing to run against the grain of a ‘No-Deal Brexit’ and its pressure on existing protections. That said, however, almost all – if not all – US free trade agreements with what is now a large number of countries have included a labour chapter, at the insistence of the United States. Some of these agreements

were concluded by the Clinton and Obama administrations where a nod in the direction of workers' rights might have been expected for ideological as well as pragmatic reasons. But many agreements were also concluded under the Bush Administration, and they too include labour chapters, even when dealing with countries similarly situated, such as Australia in 1995.

- 6.5** There are several reasons why a labour chapter would be attractive to right wing governments. One is constitutional, with the need of the US Administration to secure Senate approval for FTAs, which cannot be taken for granted, and which may yet frustrate any possibility of a quick fix post – 'No-Deal Brexit'). Another is protectionism, with minimum standards being required in order to protect US jobs. This has always been a large part of the US insistence on labour chapters in FTAs, and although it is impossible to anticipate the logic of the Trump Administration, the inclusion of such provisions in future US trade agreements would appear to be consistent with the populist rhetoric of the current Administration. One of Trump's major preoccupations has been with America First, and the concern that the US is being ripped off by free trade.
- 6.6** FTAs have been developing rapidly for twenty years or so, by-passing established international institutions, the pace of the development catching some by surprise. It is a development from which the UK has been largely excluded as a sovereign state, with the UK's interest until now having been represented by the EU (though EU FTAs are signed off by the Heads of Government of all 28 Member States, as well as the EU's representatives). The UK will now be on its own, and a question will be whether UK trade policy after a 'No-Deal Brexit' will embrace workers' rights. Although it has been the practice of US FTAs to include such provisions, and although it is likely that the EU would insist on a labour chapter in any EU–UK FTA, it does not follow that other bilateral UK agreements will include such provisions.

Workers' rights

- 6.7** But let us focus on the US, and assume that there will be a labour chapter in a future FTA with the United States, and put to one side the possibility of agreements with other countries. At this stage it is important to note that although the world is now floating on bilateral free trade agreements, there are important differences in content and approach, depending on who is driving the agreement in question. Nevertheless, on the question of labour rights, it is widely

perceived that the US approach is typically coercive, in contrast to the more persuasive approach of the EU. Indeed, in recent years US led agreements have included not only an obligation to comply with standard FTA terms, but have also sought to impose bespoke pre-conditions on labour standards to require the country in question to adopt a labour law regime that would be recognisable to US investors.

- 6.8** But that is the point: the purpose of the labour chapter in US-led agreements is to bring the other party up to US standards, minimal though they may be. It is not to impose any burden on the United States, though in fact the US routinely imposes on third countries standards that it does not comply with, and with which it has no intention of complying. That is both the contradiction and hypocrisy of the US established position on trade agreements. The point can be illustrated by taking the most advanced trade agreement in the negotiation of which the US was a party, the Trans Pacific Partnership (TPP), the proposed trade agreement between the US and a number of countries in the Pacific region, including Australia, Chile, Japan, Singapore, and others, concluded under the Obama Administration in 2016, but from which the Trump Administration has since withdrawn. In common with other trade agreements, all the TTP does is require the parties to comply with the ILO Declaration of the Fundamental Rights at Work, as well as a few opaque provisions on wages, working time, and health and safety at work.
- 6.9** The TPP has been described by Professor Joo-Cheong Tham as ‘faux regulation’,⁹⁶ as giving a veneer of regulation, while creating standards that do not, and are not intended to have any regulatory effect. Specifically, Article 19.3 thus provides as follows:
- 1.** Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:
 - (a)** freedom of association and the effective recognition of the right to collective bargaining;
 - (b)** the elimination of all forms of forced or compulsory labour;
 - (c)** the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and
 - (d)** the elimination of discrimination in respect of employment and occupation.

2. Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Unlike some EU-led FTAs, there is no obligation to 'make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so', hardly surprising given that the US has ratified only two of these eight Conventions.

- 6.10 This is what will replace the EU Treaty commitment to equal pay for men and women, the EU Charter of Fundamental Rights, and the 50 or so directives referred to earlier dealing with employment rights. There is no non-regression clause except where dilution of labour standards is being undertaken to secure a trade advantage, which of course is virtually impossible to prove and does not prevent regression for ideological reasons. Crucially, the labour provisions of trade agreements do not confer rights on individuals or organisations such as trade unions that can be enforced in a court. Rather, there is a government to government complaints mechanism that either party can invoke, a procedure that has been used only once in the history of FTAs. The latter was in a complaint by the US against Guatemala, which took nine years to resolve in the respondents' favour.

Hypocrisy of free trade

- 6.11 As part of the Brexit strategy of the May government, a number of Bills were tabled before Parliament, including Liam Fox's Trade Bill. Mr Fox was effectively fired by Johnson, his Trade Bill not yet passed by Parliament.⁹⁷ One of the key provisions of the Bill (the fate of which is now unknown) is that FTAs will need parliamentary approval, with a Lords' amendment proposing that before approval could be given Parliament should be provided with an assessment of how the Bill will affect a number of questions listed in the amendment. These included 'the United Kingdom's obligations on workers' rights and labour standards as established by the United Kingdom's commitments under the International Labour Organisation's fundamental conventions including but not limited to the Declaration on Fundamental Rights at Work'.⁹⁸ Presumably informed with a negative report, Parliament might be minded to refuse to approve the Agreement.
- 6.12 That said, this commitment to ILO standards is not something to be found in the EU treaties, the EU rendered institutionally in breach of core international labour standards by the *Viking* decision of the ECJ, a

matter to which we return in the following section. Nevertheless, there are few examples of countries having changed their labour law as a result of a FTA to improve standards by bringing them into line with the principles in the ILO Declaration. A good example of the ineffectiveness of these mutual commitments is the Australia–US FTA of 1995, which included obligations similar to those in TPP above. Although these provisions were foisted on Australia by the George Bush Administration against its wishes, they did not stop the Australian Administration in the following year enacting one of the most anti union statutes in modern times, with measures repeatedly condemned by the ILO supervisory bodies.⁹⁹

- 6.13** Twenty-three years later, Australia was still in breach. How could it be different when the driving force behind these agreements has itself ratified only two of the eight core or fundamental conventions, and is itself in breach of freedom of association principles at the time the agreements are signed and continuously thereafter? Although the US avoids close scrutiny with its compliance with core principles by non-ratification of the treaties, by virtue of membership of the ILO it is bound by the principle of freedom of association and by the supervisory jurisdiction of the Committee on Freedom of Association. The latter has found on several occasions that the United States legislation on the right to organise, the right to bargain, and the right to strike first introduced in 1935, does not comply with the obligations of the US under the ILO Constitution.
- 6.14** The Lords amendment to the Trade Bill referred to above thus misses the point. On their face, these agreements are unlikely directly to affect the UK's international labour obligations, so that it will always be possible to say that there is no direct effect. But this is not to say that there will not be an indirect and insidious effect in the sense that it will lead to a gradual decline in standards to US levels (if only because there will be no improvement on US standards), as national law regresses. The decline in standards will be a consequence of the agreements rather than something demanded by them, facilitated by the absence of any back-stop legal requirements of the kind which EU law currently provides on a range of questions, from equality and discrimination to working time and health and safety (inadequately enforced though these and other rights might be).

Constitutional questions

- 6.15** If genuinely serious about international labour standards, the Lords would insist on a clause that requires ratification and compliance with

core international standards as a *precondition* of ratification of the FTA; failing which ratification and compliance with these standards within a prescribed period (say five years); failing which at the very least the formula adopted in a number of EU FTAs that the parties will ‘make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so’. Quite unrelated to the foregoing, however, the House of Lords was right to call out two other issues, namely the effect that FTAs will have on constitutional principle, notably the rule of law and the sovereignty of Parliament. The Lords amendment would require an assessment of the implications of any agreement for both of these principles, before being approved by Parliament.

6.16 These are serious issues, which do not appear to have been addressed by public lawyers who would take us into a ‘No-Deal Brexit’. The significance of these issues is all the more notable for the fact that they appear to undermine one of the underlying tropes of Brexit, which is the desire to ‘take back control’ and reclaim the sovereignty of Parliament. Rather than do either, FTAs simply open up new avenues of surrender and subordination, which will spawn a new generation of scholarship about the extent to which FTAs are consistent with the constitutional principles ‘we’ won at the ‘Battle of Brexit’. We would submit that this is a point hitherto unexplored by those advocating Brexit. But to the extent that there is an issue, it is one that centres on the ‘Investor-to-State Dispute Settlement’ (ISDS) procedure found in practically all of the new generation of international trade agreements between States.

6.17 As explained in work published jointly with our colleague John Hendy QC:

ISDS is a legal procedure which allows multinationals (‘investors’) to sue States for millions of dollars on the basis of (actual or threatened) alleged breaches of international trade agreements such as TTIP. The usual claim is for future loss of profits on the ground that the laws of the State have not accorded the multinational ‘fair and equitable treatment’, or because national law has resulted in ‘expropriation’ of the multinational’s assets.¹⁰⁰

As that publication points out, under this procedure:

The multinational corporations seeking profit (‘investing’) in the States to be covered by the agreement make a jaw-droppingly arrogant demand of those very States. They seek the unique legal privilege of a special procedure to enable them – and no-one

else – to bring claims for alleged breach of the agreement. And such claims are to be against . . . those very States!¹⁰¹

- 6.18** This is a remarkable procedure that gives rights to investors under agreements to which these investors are not parties. As experience reveals, this procedure can be used to challenge a wide range of social, economic, and environmental policies that have an adverse impact on the interests of corporations, enabling them to extract what so far have been billions of dollars in secret arbitral processes, beyond the scrutiny of the ordinary courts. Quite apart from the fact that these procedures do not enable trade unions to enforce the labour rights provisions of the agreements, they are a curious way of re-asserting the sovereignty of Parliament. Parliament will be sovereign under FTAs and ISDS in the same way as it is sovereign under the EU and the ECJ: free to do what it likes provided it is willing to pay the high financial cost of breaking the rules.

Conclusion

- 6.19** Whoever is in government at the time of, and immediately after, Brexit not only owns the process, but also shapes the future social, economic, and political architecture of the country in quite profound ways. A Tory-led ‘No-Deal Brexit’ will put at risk four decades of labour rights, and will draw us into new economic and political agreements. These will not only pile pressure on labour rights (which the New Right have said they want to dilute or remove), but will undermine traditional constitutional practice just as profoundly as was claimed in relation to the EU, possibly more. That said, there are three potential obstacles to a Tory-led Brexit, even if there is a ‘No Deal’ outcome on 31 October: the practicality of negotiating FTAs quickly; the role of the EU which, as the closest and largest trading block, will continue to have an important role in shaping the future; and the inevitability of a general election.
- 6.20** So far as the first is concerned, it cannot be assumed that whatever the US Administration negotiates in a FTA will be endorsed by Congress. The new North American Free Trade Agreement has been held up by Congress, and there have been reports that Irish America is mobilizing to block any US–UK FTA that sacrifices the interests of Ireland. Secondly, while the US may impose limited demands on labour rights, the UK will still have to negotiate a FTA with the EU. Given EU concerns about a ‘Singapore on Thames’, it is important that Brussels demands stronger non-regression and dynamic alignment than demanded in negotiations

so far. And thirdly, the Tory Right get to own and shape Brexit only if they win and continue to win elections. This is a matter to which we return to later.

Box 6 – Free Trade Agreements – and the dangers of a new Trans-Atlantic alignment

Key points

- **Brexit entails the certainty of a new Trans-Atlantic realignment with the US, the UK being the weaker party (in effect a ‘rule taker’) to, perhaps a series of, complex free trade and regulatory treaties.**
- **Such FTAs would open up new avenues of social surrender and economic subordination.**
- **FTAs concluded by the USA with third countries pay little or no attention to labour standards, even compared to the relatively weak provisions contained in EU-signed FTAs, such as CETA.**
- **FTAs concluded by the USA typically involve ‘Investor-to-State Dispute Settlement’ procedures (or ‘ISDS’) empowering private multinational ‘investors’ to sue a State party to the Treaty that decides to ‘renationalise’ a service previously outsourced to a foreign based private company.**
- **ISDS can be used to challenge a wide range of social policies that have an adverse impact on the interests of corporations, enabling them to extract billions of dollars through secret arbitral processes, beyond the scrutiny of the ordinary courts.**

A Brexit dividend for workers’ rights?

Introduction

- 7.1** We have given so far a wholly positive account of EU labour law. But there is another side to the coin which needs to be acknowledged and addressed. First is the role of the European Commission in dismantling the collective bargaining and employment protection standards in a number of countries by a variety of means. This is a

story that has been told elsewhere and does not need to be repeated here,¹⁰² principally because it has had no direct bearing on the United Kingdom. One of the many ironies of Brexit is that, for the past two decades and increasingly since 2009, the other Member States were being directed to adopt something like the British labour relations model of open markets, decentralised collective bargaining, and minimum statutory standards.

- 7.2** It is a matter of conjecture whether this policy would have a bearing on the United Kingdom were we to have remained in the EU under a Labour government. Labour now has radical and progressive industrial relations policies which run against the grain of recent EU initiatives. That said, EU policy was driven in part by the financial crisis in 2008, and there are signs that even the international economic and financial institutions now believe that these policies have been too regressive for the well-being of capitalism. Labour's policies coincidentally are not out of line with recent publications from the IMF and the OECD which are promoting the restoration of collective bargaining.¹⁰³

Viking and Laval

- 7.3** It is nevertheless the case that it is not only the economic policies of the Commission that give rise to grave concerns. More visible and more directly relevant in the British context are the decisions of the ECJ. It is true that this seems paradoxical in light of the benefits of the ECJ jurisprudence set out earlier. Nevertheless, irreparable harm was done to the European project by the decisions of the ECJ in *Viking*¹⁰⁴ and *Laval*,¹⁰⁵ which unleashed forces we believe future historians will be able credibly to say contributed to Brexit. Great legal decisions have great political consequences, for which judges need to take both care and responsibility.
- 7.4** There is no question that the *Laval* decision contributed to the rhetoric around the East Lindsey dispute, and the toxic language from the then Prime Minister Gordon Brown who demanded 'British jobs for British workers'.¹⁰⁶ Yet as we have seen, the *Laval* decision did not cause the problem at East Lindsey, which was pre-eminently a failure of British labour law under a Labour government – relying on voluntarism and indifferent to the consequences of poor enforcement mechanisms. This contrasted with the position in Ireland at the time – a country with similar industrial relations traditions to our own – where by legislation, collective agreements could be registered with the Labour Court and made universally applicable within the terms of the Posted Workers Directive.¹⁰⁷

- 7.5** This, however, as already noted earlier, is a problem in the process of being addressed by political means – not by changes in British labour law to respond to the demands of EU law, but by EU law responding to the deregulated labour laws of countries such as the United Kingdom. That said, however, these changes do not address the problems caused by *Laval's* twin, the *Viking* judgment, in which the Court recognised the existence of the right to strike in EU law, but then subordinated it to the interests of business. Thus as is well known, in the *Viking* case the CJEU held that action by the International Transport Workers' Federation (ITF) to put pressure on the Viking Line was held to violate the company's freedom of establishment.¹⁰⁸
- 7.6** The latter freedom is expressly protected by the TFEU, which effectively creates a constitutional entrenchment of free enterprise, with four fundamental freedoms that can be compromised only in exceptional circumstances. According to the ECJ in the *Viking* case, the exercise of the right to strike may be a legitimate restraint on these freedoms, but only if the strike can objectively be justified, and even then if it is a proportionate response. These are matters to be assessed by a court, about which no labour lawyer schooled in the common law tradition can be sanguine. Although the right to strike has been written into the EU Charter of Fundamental Rights, so too have these conditions.

Consequences of *Viking*

- 7.7** The *Viking* case was a major ideological victory for employers: it was a triumph for free enterprise; for business over labour, and for economic freedoms over social rights. And to put the icing on the cake, it entrenched that victory as a matter of the constitutional law of the EU in circumstances that would be difficult to correct, unless the Court itself chose at some stage to reverse the decision. That said, the issue in the *Viking* case related to secondary or solidarity action by the ITF in support of its Finnish affiliate. If the case had been governed by the law of the United Kingdom, the action would have been unlawful (though it would have been lawful under the law of Finland where the right to strike enjoys constitutional protection).
- 7.8** To the extent that the Court in *Viking* indicated that the secondary action was displaced by the Treaty-based freedom of the employer, it thus took nothing away from British unions. Nevertheless, the decision affected all forms of industrial action, not just solidarity or secondary action. Its effects were felt immediately in a dispute

between the BA and BALPA about the relocation of part of the company's operations from London to Paris.¹⁰⁹ Concerned about the impact of the partial relocation on members' jobs, BALPA balloted for industrial action, and a majority voted in favour of industrial action. So far as we can tell the action proposed by the union would otherwise have met the requirements of British law, though this did not stop the company threatening legal action under the newly minted *Viking* decision.

- 7.9** It is difficult to know if the action in the courts would have succeeded. But the point overlooked by the ECJ in the *Viking* case is that the threat of litigation will be enough (as it was in this case), given the costs of defending a claim to a small union, and the threat of bankruptcy if the employer were to succeed, and then recover damages for losses suffered. Again it is unclear how these damages would be assessed, but there was a well informed risk that they would be uncapped and that the union would be liable for all the economic losses suffered by the employer. In this sense, *Viking* was taking British law back to the *Taff Vale* decision in 1900, from the implications of which trade unions were rescued by legislation introduced by a Liberal government in 1906. Although that legislation has since been repealed, British law imposes only limited liability on trade unions, at levels never increased since 1982.

Box 7 – What are the implications of Brexit for the *Viking* case?

The *Viking* case will in practice cease to operate as a restraint on the freedom of British trade unions. In practice that will not amount to very much:

- The action of the ITF (secondary action) would have been unlawful under British law, restraints in British law which Brexit will not remove; but
- The action of the ITF would continue to be unlawful under EU law after Brexit, and the union would continue to be liable, whether in the British courts or elsewhere; however,

(Continued)

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- **Brexit will remove a barrier to trade unions taking industrial action to protest about capital flight leading to a loss of jobs; but**
- **Brexit may be the cause of the capital flight, which the removal of EU legal restraints on industrial action will do nothing to prevent; in other words**
- **Brexit will remove legal constraints that will enable workers to protest against the self-inflicted consequences of Brexit.**

7.10 There are, however, two points on which to reflect. First, the Court of Appeal has limited the domestic effect of *Viking*, rebuffing an attempt to halt a strike about driver only operated trains, on the ground that it would interfere with the employer's right to freedom of establishment.¹¹⁰ The British operation was part-owned by a French company, which provided rail services to Gatwick airport. It remains the case nevertheless that this does not overcome the problems in BALPA, which Brexit alone will address. Secondly, however, while industrial action to protest against business relocation to EU Member States will now be lawful, the rediscovery of that right will be cold comfort should Brexit become the direct cause of that relocation, which striking workers are powerless to prevent. Regaining a right the exercise of which would be no more than a gesture would be a Quixotic reason to support Brexit.

Alemo Herron

7.11 The other decision of the CJEU that has caused problems in the United Kingdom is *Alemo Herron*¹¹¹ which had major implications for the protection of wages in the contracting out of public services. In this case Mark Alemo Herron was employed by Lewisham LBC under contractual terms set out in the National Joint Council for Local Government Services, a collective agreement to which UNISON was a party. Under his contract, Alemo Herron was entitled in effect to the terms of the collective agreement for the time being in force, so that when the union negotiated a pay rise, it would automatically apply to him and to the other employees engaged on the same terms. However, the service in which Alemo Herron was engaged was contracted out to a company

called Parkwood Services Ltd, at which point questions arose about its liability to accept collectively agreed terms.

7.12 These issues arose in the context of the Transfer of Undertakings Regulations 2006. This provided that a business transfer does not have the effect of terminating the employment contracts of those employed by the transferor, and that the contracts continue with the transferee on the same terms as at the point of the transfer, until the contracts are lawfully varied. This gives effect to the Acquired Rights Directive 2001/23, which is designed ‘to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded’ (paragraph 3 of the Preamble). The Directive provides specifically that ‘the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee’ (Article 3(1)).

7.13 The issue in *Alemo Herron* was whether transferred workers were entitled to the terms of the collective agreement in force at the time of the transfer, or the terms of the collective agreement as it changes over time. In other words, is the collective agreement transferred as a static or a dynamic instrument, to use the language deployed in the decision? The domestic courts were divided on the matter, the employment tribunal holding that the employer was bound only by the terms in force at the date of the transfer, to be overruled by the EAT which held that the employer was bound by the terms of the agreement as they evolved over time. The Court of Appeal disagreed with the EAT and restored the decision of the ET, but the Supreme Court was attracted to the position of the EAT:

There can be no objection in principle to parties including a term in their contract that the employee’s pay is to be determined from time to time by a third party such as the NJC of which the employer is not a member or on which it is not represented. It all depends on what the parties have agreed to, as revealed by the words they have used in their contract. The fact that the employer has no part to play in the negotiations by which the rates of pay are determined makes no difference. Unless the contract itself provides otherwise, the employee is entitled to be paid according to the rates of pay as determined by the third party.¹¹²

7.14 However, in light of an earlier decision of the ECJ from Germany, the UK Supreme Court referred the matter to the ECJ for a preliminary ruling on whether the domestic courts must give effect to the dynamic clause in the collective agreement; whether they may do so; or

whether they are prohibited from doing so. To this question the Court replied in devastating fashion that the Directive and the implementing Regulations:

must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.

To make matters worse, the latter decision was informed by the EU Charter of Fundamental Rights, which was used to empower the employer. Of particular importance for this purpose was Article 16 dealing with the freedom to conduct a business. This was said to include freedom of contract, which helped to lead to the conclusion that an employer could not be bound by the evolving terms of a collective agreement to which he or she was not a party.¹¹³

Contextualising *Alemo Herron*

7.15 There is no doubt that *Alemo Herron* was a grim decision, not least in weaponising the EU Charter in the employer's favour. Employers now enjoy the benefit of fundamental freedoms as well as fundamental rights, the Court content to overlook the fundamental rights of workers, including Article 28, which provides that:

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

It is hard to see how that provision was not applicable in *Alemo Herron*, and if so why it should be displaced by Article 16. But if Article 28 was to be displaced by Article 16, it is not clear why the employer's contractual interests should take priority over the contractual interests of workers, which would have been known to the employer at the tendering stage.

7.16 But for all that, the *Alemo Heron* decision would be another curious item to add to the charge sheet of reasons to leave the EU. It was a decision providing a narrow application of a right that exists only because we are members of the EU. But for EU membership, there

would have been no TUPE, and no transfer of even the static terms of the collective agreement. It is true that there might have been equivalent British legislation under the Thatcher/Major, or Blair/Brown governments (as there is not in the USA). But even if there was such home grown legislation from these governments, it is almost certain that commercial pressures would have precluded its operation on the same expansive scale carved out by the ECJ in earlier cases, only as a result of which EU law applies to the transfer of public service contracts, as in *Alemo Herron*.

- 7.17** It is true that after Brexit, the decision of the CJEU in *Alemo Herron* will no longer be binding authority, and that by virtue of the European Union (Withdrawal) Act 2018 it will be open to the UKSC to reverse it. Although this seems unlikely, it is not implausible given the extent to which the CJEU in *Alemo Herron* relied on the EU Charter of Fundamental Rights, which will have no application in the UK post-Brexit. More to the point perhaps, after Brexit TUPE will be British law not EU law, so that even if the UKSC were to disapply the ECJ's decision in *Alemo Herron*, the UKSC could just as quickly be overturned by legislation. And even more to the point, it will be possible for the government to revoke TUPE altogether, or amend the Regulations in any other way it sees fit. There would then be no *Alemo Herron* problem.
- 7.18** But to the extent that there is an *Alemo Herron* problem, in addition to attacking the ECJ, a moment's quiet self-reflection is required on the part of labour lawyers. *Alemo Herron* is a problem created in London not Luxembourg. It reflects the weakness of British labour law, not EU labour law, and a failure of the two tier workforce arrangements that were negotiated in 2005, the weaknesses of which the IER pointed out at the time.¹¹⁴ An alternative to the two tier workforce agreements would be procedures which made sectoral agreements legally binding on a sector by sector basis, as is the case in other EU Member States. Indeed, the weakness of British labour law is a recurring theme associated with many of the problems identified in this article. Our primitive methods were found out by EU legislation designed for more sophisticated labour law regimes.

Conclusion

- 7.19** The best alternative to the two tier workforce problem would be for all public services to be delivered by public bodies, and the end of outsourcing – another unfortunate Thatcher initiative and legacy. But in the absence of such a solution the best way to protect workers in the

two-tier workforce would thus have been to formalise NJC agreements by legislation, so that they were universally applicable throughout the sector in question, regardless of the identity of the employer. The issue was coincidentally a live one when two-tier workforce agreements were being concluded, with the TUC having done some preparatory work on sectoral bargaining in response to an opaque and now long-forgotten Labour Party commitment in 2005. This however was abandoned in favour of other options, options now exposed as having been woefully inadequate. *Alemo Herron* is the consequence: ‘for whatever a man sows, this he will also reap’.

- 7.20** It is the same problem as in the East Lindsey dispute referred to above. We had sectoral agreements in the construction industry but had no legal procedure to make them universally applicable, which would have resolved a lot of the problems of alleged undercutting at East Lindsey. So we blame the EU as a result of the primitive nature of our labour law, rather than ourselves for not having adopted more sophisticated structures. And we are content when instruments like the PWD are reformed to come down to our level, rather than demand that our laws are improved to meet the conditions of a Directive so obviously drafted in 1996 for better labour law systems than ours. Which is not to deny that *Alemo Herron* like *Viking* before it is an ideological outrage. But if there is anyone out there who thinks that the common law of England is not similarly ideologically inclined, hard lessons will soon be learned.

Box 8 – A Brexit dividend for workers’ rights?

Key points

- There is no doubt that EU law has not always been on the side of workers, especially when interpreted regressively by the CJEU in cases such as *Viking*, *Laval*, and *Alemo Herron*.
- However the regressive effects of these judgments have been greatly magnified by the inherent weaknesses of the UK voluntarist system of industrial relations.
- Successive UK governments could have taken action to mitigate their consequences – in line with what other EU Member States have done – but have hitherto failed to do so.

- They could do so in the future by introducing universally applicable sectoral collective agreements, as recommended by IER in *Rolling out the Manifesto for Labour Law* (2018).
- The damage that Brexit would cause to UK labour rights substantially outweighs any (real or imaginary) Brexit dividend.

Conclusion – a Labour Brexit?

Introduction

- 8.1** The unspoken truth of Brexit is that the process and the post-Brexit architecture will be owned and determined by the political party and government in power at the time. This is a hugely ideological process which will impact directly on workers' rights, the Right having made clear that control over workers' rights is one of the prizes they seek. Much of what has been presented in this text reveals the dangers should the Tories be in a position to lead the country into Brexit and to design the architecture for the future of the country. EU retained workers' rights will be exposed to further erosion, a process that FTAs will help to consolidate.
- 8.2** There is of course an alternative scenario whereby the process of Brexit and the future architecture would be designed by Labour, either alone or in government with the support of other parties. That is assuming of course that Brexit must take place, about which there is still contestation, with Labour currently offering a second referendum in which 'Remain' will be an option on the ballot paper and a number of senior party members, including within the Shadow Cabinet, suggesting they would campaign for 'Remain'. However, in the event of a Labour-led Brexit, what are the steps that would be necessary to protect workers' rights, and how could they be secured for the future?

Withdrawal agreement and political declaration

- 8.3** At the time of writing we are being offered the possibility of Johnson's 'Hard Brexit' or May's Withdrawal Agreement and Political Declaration.
- The Withdrawal Agreement specifies that upon the expiry of a transition/implementation period, the status and domestic relevance of EU labour standards after Brexit would be shaped by three articles contained in Annex 4 of the 599 pages long Agreement. The three articles

appear to offer some reassurances in terms of ‘Non-regression of labour and social standards’ (Article 4); commitments to ‘Multilateral labour and social standards and agreements’ (Article 5); and ‘Monitoring and enforcement of labour and social standards’ (Article 6).

(The UK government promptly interpreted the foregoing as amounting to a mutual ‘commitment by both the UK and the EU to prevent any reduction in the levels of environment and labour protections as they stand at the end of the implementation period, known as a non-regression provision, and to maintain existing international commitments in these areas’.)¹¹⁵

- The accompanying Political Declaration refers to ‘workers rights’ on two occasions, but in very vague terms. Paragraph 2 of the Declaration simply states the ‘determination’ of the UK and EU to promote ‘high standards of free and fair trade and workers’ rights’, while Paragraph 3 says that the two parties agree that ‘prosperity and security are enhanced by embracing free and fair trade, [and] protecting workers, consumers and the environment’. Paragraph 79 provides that ‘The future relationship must ensure open and fair competition. Provisions to ensure this should cover state aid, competition, social and employment standards’.

8.4 In reality the protections offered by these provisions are at best ambiguous and at worst weak and ineffective. They are barely an improvement on ‘Hard Brexit’, and they leave workers’ rights similarly exposed. Thus, Article 4 commits the EU and UK to ensure that, in the area of labour and social rights, ‘the level of protection provided for by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period’. Article 4 expressly provides that this commitment applies ‘With the aim of ensuring the proper functioning of the single customs territory’ that should replace the current customs union and single market arrangement currently in operation. The commitment to non-regression is thus very vaguely phrased and several questions remain unanswered. For instance, would it cover transnational provisions such as the European Works Council Directive 2009/38? The Commission appears to believe that it may not do so.¹¹⁶

8.5 More generally, however, what is meant by regression? Will the term be interpreted in line with the ECJ’s very weak jurisprudence on ‘non-regression clauses’ contained in a number of existing EU directives (see Case C-144/04, *Mangold*, paras 50–54)?¹¹⁷ Does non regression require a drop in the level of protection such as to hamper ‘the proper

functioning of the single customs territory'? Or would it require the other party to demonstrate that the drop in standards was engineered to distort trade and gain a competitive advantage? If these were the tests, then it would be arduous, if not impossible, to claim a breach of the vague undertakings made in Article 4. And equally important, who would decide on these fundamental questions, considering that Article 4(2) expressly excludes labour and social rights from the new dispute settlement mechanism that would replace the ECJ, as outlined in the Withdrawal Agreement, Articles 170–181? It surely cannot be left to the domestic courts, anymore than the ECJ itself.

- 8.6** Article 5 offers warm words in terms of the UK and the EU commitment to 'protect and promote social dialogue on labour matters among workers and employers, and their respective organisations, and governments', and to 'implement effectively in their laws, regulations and practices the International Labour Organisation Conventions, and the provisions of the Council of Europe European Social Charter, as ratified and accepted by the United Kingdom and the Member States of the Union respectively'. But the reality is that neither the UK, nor some of the other EU Member States, nor the EU itself have a clean record in terms of respecting, let alone promoting, ILO backed fundamental labour rights such as freedom of association or the right to bargain collectively.¹¹⁸ Similar or comparable words are contained in a number of EU trade agreements, and it is fair to say that they have failed to promote or protect labour standards.¹¹⁹ In the case of the UK such references are particularly hollow in view of the Trade Union Act 2016, which violated these obligations.

May's inadequate proposals

- 8.7** There was nothing particularly difficult about this for the May-led Tory government. In her 2017 Lancaster House speech, Theresa May made a commitment to 'ensure that workers' rights are fully protected and maintained', and that 'not only will the government protect the rights of workers set out in European legislation, we will build on them'. In addition, a White Paper in July 2018 committed the government to 'the non-regression of labour standards', and proposed that 'the UK and EU should commit to uphold their obligations deriving from their International Labour Organisation commitments'.¹²⁰ The real question was how it could be translated into domestic law given the nature of the government's red lines, including in particular taking back control of our own laws. We were soon to find out, as the government was forced to give some indication of what these commitments would look

like, as it sought to win Labour support (or at least the support of some Labour backbenchers) for the Withdrawal Agreement more generally.

- 8.8** Government proposals published on 6 March 2019 distinguished between existing EU law on workers' rights, and future EU law on workers' rights.¹²¹ So far as the former were concerned, the non-regression undertaking was to be met by requiring ministers to certify to Parliament by means of a statement of non-regression that any Bill will not lead to an erosion of workers' rights. Alternatively, the minister may 'make a statement to the effect that although the Minister is unable to make a statement of non-regression the government nevertheless wishes the House to proceed with the Bill'. The latter was to be met by a requirement of regular reporting by ministers to Parliament of any new Brussels employment rights initiative, and a statement from the government on whether or not it intended to match what was being proposed. As might be expected, these proposals fell far short of what was required, it proving impossible to reconcile the need to safeguard EU based rights with the desire of the government's supporters to leave the EU.¹²²
- 8.9** The fact is that these guarantees offered no real guarantee of anything: there was no guarantee that a future government would not breach the non-regression undertaking, and no guarantee that any future Tory government would accept any new EU initiative. As was pointed out by a barrister who was instructed by several unions for an Opinion on the proposals, 'There is therefore simply no possibility of any entrenchment of rights, whether of workers or any other persons, under the UK constitution once the UK is no longer a Member of the European Union'.¹²³ This is the effect of Brexit and the restoration of full throttled parliamentary sovereignty. No government can bind its successors, and nor can any Parliament. The only way by which non-regression can be achieved and a legally binding commitment made to implement future EU initiatives would be in an agreement with the EU, where these obligations were imposed as part of its terms. This would then have a number of implications that would cut across some of the Tory government's red lines.
- 8.10** Thus, there cannot be binding obligations of non-regression and non-divergence without an opportunity to challenge any alleged regression and divergence before a judicial body, as is currently the case with the ECJ. The latter receives complaints from the European Commission that there has been a failure properly to implement a Directive, and references from national courts for a ruling about the obligations of implementation. It is difficult to see how that process could be replicated, short of an ongoing relationship with the EU similar to that currently enjoyed by Norway, which also suggests the UK participating as members of the EEA. As mentioned

earlier this would mean that most of the EU workers' rights provisions would continue to apply, with the UK being for all purposes a 'rule taker' (i.e. without any ability to challenge it).

Regression and divergence: an alternative

- 8.11** In the absence of any such formal relationship with existing institutional structures (which at the time of writing seems implausible), the only option would be a bespoke agreement between the United Kingdom (so long as the United Kingdom continues to exist) and the EU, which is different from both the EEA and existing FTAs of the EU–Canada variety. We mention the latter because it is clear that this is the preferred option of the Right. What is proposed then is that any bespoke agreement would have to be of a qualitatively different kind from the kind of agreements so far concluded. That agreement would first have to specify non-regression from existing EU-sourced rights. But a *full* non regression commitment has a number of consequences not yet contemplated, and would mean for a start that it would have to be *dynamic non-regression* (as well as *dynamic alignment*). This means non regression both from existing standards and from the standards of the EU obligation, as determined by the ECJ from time to time, where the ECJ interpretation is more favourable than that of the domestic courts applying the same provision.
- 8.12** This would mean in turn amending the European Union (Withdrawal) Act 2018 so that the domestic courts are bound not only by pre-Brexit jurisprudence of the ECJ (which could not be overruled in its British application as is currently proposed), but also by post-Brexit jurisprudence of the ECJ where this relates to workers' rights legislation based on EU directives. Apart from a full and dynamic non-regression, there would also have to be a means of enforcing this obligation that does not rely on the FTA model of State-to-State complaints (or as a variation thereof of Commission-to-State complaints). To this end it would be necessary to replicate existing arrangements whereby workers personally can: (i) commence proceedings to enforce directives against the State as employer; (ii) recover from the UK government for losses suffered as a result of a failure to implement a Directive in those cases where the State is not the employer; and (iii) have the right to an effective remedy for any breach established by a court.
- 8.13** So far as the need to continue to adopt future EU obligations is concerned, this is more difficult, first because there is no reason why it should not be mutual. That is to say, if the United Kingdom is to be bound by new progressive workers' rights provisions in EU law, why should the EU not be bound by more progressive workers' rights provisions operating in the

United Kingdom? The idea that the United Kingdom has anything to teach the EU at this stage seems fanciful, yet it would be less fanciful were we to elect a Labour government with a radical agenda and the means to implement it. But secondly, it would mean that the United Kingdom would be under a binding obligation under international law to give effect to future initiatives of the European Union, from which it could not resile. This would be equivalent to granting Brussels a blank cheque, in relation to laws over which the United Kingdom would have no formal role in their enactment, whether made by parliamentary or social dialogue procedures.

8.14 That apart, the process of non-divergence would specifically require various initiatives of government. The simplest solution would be to enact general legislation to impose an obligation on ALL employers to comply with ALL EU workers' rights instruments made after Brexit. A more complex approach, but one consistent with present rules of EU membership is one whereby:

- The government would be required to legislate on the occasion of any new EU workers' rights instrument. As above, failure to implement would have to be justiciable at the suit of the Commission before an independent judicial body; if not the CJEU then a body of similar stature.
- Generic legislation would be required to provide that
 - individual workers employed by a public authority would have the right to sue the government to enforce the Directive in the event of a failure to implement; and
 - those employed by a private employer would have the right to sue the government for losses suffered as a result of a failure on the part of their private employer to comply with the Directive.

(The Directive would impose no obligation on the employer to comply in the absence of implementation.)

Empowering workers, transforming workplaces

8.15 Readers can speculate on the plausibility on any of the foregoing. We share the scepticism. But without some creative thinking and radical action (which would not be easy to reconcile with Brexit), talk of non-regression and non-divergence is just that: talk. There is no harm in repeating a point already made in this article: workers' rights are at risk as a direct consequence of Brexit. Those who voted to leave may not have intended to put their holiday pay at risk. But there is now no EU backstop that would prevent

a Right wing government taking it away, reducing it, or diluting it in whatever way the government wants and Parliament agrees. To regain control means control over everything. The sovereignty of Parliament means that the government that controls Parliament is also the government that controls the substance of workers' rights. We are now dependent on the EU driving a hard bargain to protect British workers' rights in any future trade deal. But as we have seen, neither the Withdrawal Agreement nor the Political Declaration revealed a desire to insist on anything meaningful.

- 8.16** The best guarantee for workers' rights after Brexit would be the election of a Labour government with a progressive programme for the revitalisation of workers' rights as part of a bigger programme for redistribution of wealth, the expansion of equality of income, and the promotion of democracy in the workplace. As the Institute of Employment Rights has argued for some time – most recently in the 2018 publication *Rolling out the Manifesto for Labour Law* – the implementation of that programme will require changes to the machinery of government, with the establishment of a dedicated government department to develop an agenda for workers' rights, and the capacity to drive it forward. At the heart of that agenda are two fundamental policy requirements: the first is the expansion of collective bargaining beyond its current coverage level of 26% or so, to something like its pre-Thatcher levels in excess of 80%. The other is the extension of statutory protection for workers, and in particular steps to ensure that the law applies to everyone who works for a living. Labour law must be rich in content, but also inclusive and effective in scope.
- 8.17** So far as the first of these requirements is concerned, this means travelling in a different direction from that of the European Commission since 2008. Since then the Commission has undertaken a policy of collective bargaining decentralisation, a policy pursued in a number of ways and towards requiring a number of Member States (though not all) to promote labour flexibility and, it seems, to reduce labour costs.¹²⁴ The means chosen include the conditions imposed as a result of financial support during the Eurozone financial crisis, and interventions on a country by country basis under the TFEU, Title VIII. By these coercive soft law means, the Commission and other EU institutions have been operating by stealth to achieve policy objectives that would not have been possible by the use of open and formal legislative powers. The challenge for a future Labour government would be to rebuild the collective bargaining structures which have been actively destroyed in the United Kingdom, independently from any EU pressure, by a conscious decision to adopt ineffective US-style decentralised bargaining structures that others, including the Commission, have seemed keen to mimic.

8.18 The second of these requirements will require a radical restructuring of employment rights, both EU and non-EU sourced. The issues here relate to the substance of employment protection legislation, with employer practices fast out-pacing the legal framework. Prominent gaps here relate to working time, with the focus of the law being on regulating for excessive working hours, and insufficient time devoted to ensuring that workers have enough hours to generate a decent wage. The so-called gig economy – rapidly expanding into new areas – also presents challenges for regulation, raising questions about the need to address the question of the scope of labour law. Who benefits from labour law’s protection? To which the answer should be everyone who works for a living. But expanded rights, expansively applied mean little unless we address the deliberate problem of ineffective enforcement, with workers currently unable to access, enforce and recover basic protections and entitlements.

Conclusion

8.19 It is impossible to say what will happen to workers’ rights after Brexit. Much depends on electoral outcomes and the choices workers as citizens make at the polls. To that extent the working class is in control of its own destiny. If electoral outcomes continue on a rightward trajectory, we all may find that the freedom for which many workers voted on 23 June 2016 is a rather empty one. Voters will have stopped freedom of movement to the United Kingdom but also their own freedom of movement from the United Kingdom. And they will have won control over the legislative process, but elected parties committed to eroding their European inheritance. The same voters will have the opportunity soon enough to determine whether the contestable enhancement of their rights as citizens has outweighed the rights they will have lost as workers.

8.20 The other possibility of course is that politics takes a different turn and a new trajectory. This indeed is the only way by which the European inheritance can be secured. A government of the Left will not only protect from erosion what is currently on the statute book, but would be expected to repudiate the tendencies of the European Commission currently to decentralise collective bargaining arrangements and deregulate employment protection legislation (though there are signs in the European Social Pillar of movement in the other direction). This strategy of hold and develop is one that we would also expect to see carried into the government’s relationships with the EU and other countries post-Brexit. Ironically, this is a strategy that a progressive Britain would be able to pursue with much greater consistency from within rather than outside the EU political structures.

Box 9 – Conclusions – a Labour Brexit?

Key points

- There is no possibility of any unilateral entrenchment of workers' rights under the UK constitution once the UK is no longer a Member of the European Union.
- The only way by which non-regression could be achieved would be in an agreement with the EU, with non-regression and dynamic alignment imposed as part of the terms of the Treaty, with a process enabling challenge to any regression or divergence before an impartial adjudicating body, similar to the CJEU in stature and powers.
- Still much would be lost in terms of the EU legal effects and in terms of the UK's participation to EU standard setting (unless the EU accepted dynamic alignment as a mutual process, whereby it would also have to up its standards should the UK decide to raise its own – a very unlikely prospect).
- Reinvigorating UK workers' rights depends on future, progressive, parliamentary majorities consistently developing them. But this strategy of hold and develop is much more achievable from within the political structures of the EU, rather than outside them.

Notes

- 1 European Council, 'European Council (Article 50) Guidelines for Brexit Negotiations', (29 April 2017), para 5.
- 2 Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union' (Cm 9446, March 2017), p 14.
- 3 European Council, 'European Council (Article 50) Guidelines for Brexit Negotiations' (29 April, 2017) para 20 (Emphasis added).
- 4 See EEA Treaty, Part IV.
- 5 Notable exceptions are the two Equal Treatment instruments of 2000, Directive 2000/43 and 2000/78, excluded by virtue of their historical legal base not being related to the functioning of the single market. By the same token, while Norway is bound by Article 28 of the Agreement to EU rules on free movement of persons, including Directive 2004/38, all reference to the concept of 'union citizenship' are carefully expunged by Annex V to the Agreement.
- 6 For full details of FTAs, see the the WTO Regional Trade Agreements database available online. At the time of writing the EU has concluded some 42 Trade Agreements, that apply and will continue to apply to the UK at least until the Brexit date. In preparation for Brexit

the UK has negotiated 12 such agreements that essentially replicate the ones signed by the EU, but none of which can come into force while the UK remains a member of the EU.

- 7 European Commission, 'Guide to the Comprehensive Economic and Trade Agreement (CETA)' (European Union, 2017), p 3.
- 8 A Beecroft, *Report on Employment Law* (2011), p. 4.
- 9 TEU, Article 3(3).
- 10 Ibid.
- 11 TFEU, Article 9.
- 12 Ibid., Article 119(1).
- 13 We are of course alluding to the infamous case law developed by the ECJ and often referred to as the *Viking* and *Laval* 'quartet' for which a highly commendable and authoritative analysis can be found in J Malmberg, 'The Impact of the ECJ Judgments on *Viking*, *Laval*, *Rüffert*, and *Luxembourg* on the Practice of Collective Bargaining and the Effectiveness of Collective Action', European Parliament, 2010. *Viking* and *Laval* are further discussed below.
- 14 Case 152/84, *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] ECR 723.
- 15 Case 14/83, *Von Colson* [1984] ECR 1891; Case C106/89, *Marleasing* [1990] ERC I-4135.
- 16 Case C-6/90, *Francovich v Italy* [1991] ECR I-3843.
- 17 Case 26/62, *Van Gend & Loos* [1963] ECR 1, para 3.
- 18 Case 6/64, *Costa v ENEL* [1964] ECR 585; and Case 11/70, *Internationale Handelsgesellschaft mbH* [1970] ECR 1125, respectively.
- 19 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
- 20 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
- 21 SI 2019 No. 859.
- 22 However, the European Union (Withdrawal) Act 2018 provides that 'a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal' (s 6).
- 23 Case 43-75, *Defrenne v Sabena* [1976] ECR -00455 ; Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR-00723.
- 24 HM Government, 'Review of the Balance of Competences between the United Kingdom and the European Union Social and Employment Policy' (2014), p. 28, note 8. The total figure excluding repealed directives and directives repealed by recast/ codified directives.
- 25 This compares with the influence exerted on domestic environmental or agricultural regulation, where 'over 1,100 core pieces of directly applicable EU legislation and national implementing legislation have been identified as Defra-owned', see House of Lords, European Union Committee, HL Paper 109 (2016–2017), p. 10.
- 26 For instance, see the Race Relations Act 1965 or the Equal Pay Act 1970, and more recently, the Disability Discrimination Act 1995.
- 27 House of Commons, Women and Equalities Committee, Oral evidence by Professors C Barnard and A McColgan, HC 657 (2015–2016).
- 28 The main significant exception being the requirement to pay part-time workers on a pro-rata and equal treatment basis with comparable full-time workers, as required post *R v Secretary of State for Employment, ex parte EOC* [1394] IRLR 493 (Divisional Court).

- 29 [2012] 2 CMLR 25.
- 30 SI 1998 No 1833.
- 31 TUC, 'UK Employment Rights and the EU – Assessment of the Impact of Membership of the European Union on Employment Rights in the UK' (2016), p. 5.
- 32 CBI, 'CBI Response to the Balance of Competence Call for Evidence: Social and Employment Review' (2014), p 3.
- 33 HC Debs, 17 January 2013, col 40WS
- 34 A Beecroft, 'Report on Employment Law' (2011), p. 13.
- 35 Ibid.
- 36 Case C-188/03, *Junk Irmtraud v. Wolfgang Kühnel* [2005] ECR I-885.
- 37 See in particular the Citizens' Rights Directive 2004/38/EC, and Regulation 492/2011.
- 38 O Hawkins, 'Migration Statistics', House of Commons Library Briefing Paper, Number SN06077 (7 March 2017), p. 23.
- 39 Ibid, p 26. The report refers to 2011 and notes that UN migration statistics put the figure at 1.2 million.
- 40 European Council, 'Article 50 Guidelines for Brexit Negotiations', (29 April, 2017).
- 41 This also applies to the so called 'cost' of migration. See C Vargas Silva, 'Briefing – The Fiscal Impact of Immigration in the UK' (Oxford Migration Observatory, 2015).
- 42 House of Lords, European Union Committee, HL Paper 72 (2016–2017), ch 2.
- 43 Ibid., para 23.
- 44 M Martinez Lucio, A Koukiadaki, and I Tavora, *The Legacy of Thatcherism in European Labour Relations: The Impact of the Politics of Neo-Liberalism and Austerity on Collective Bargaining in a Fragmenting Europe* (IER, 2017).
- 45 Migration Advisory Committee, EEA Migration in the UK: Final Report (September 2018).
- 46 Ibid., paras 1.39 and 1.40.
- 47 Ibid., p 17.
- 48 *Daily Telegraph*, 6 June 2007; TUC, 10 September 2007 ('British' used 24 times in the speech); and *BBC News*, 24 September 2007 ('British' used 27 times in Labour Party speech).
- 49 See *The Guardian*, 30 January 2009.
- 50 See *The Guardian*, 10 August 2019.
- 51 K Marx, 'Instructions for Delegates to the Geneva Congress', in D Fernbach (ed), *Pelican Marx Library*, vol 3 (1974), p. 91.
- 52 *The Guardian*, 30 January 2009.
- 53 Ibid.
- 54 ACAS, *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute* (2009).
- 55 Ibid., para 9.
- 56 Posted Workers Directive (96/71/EC).
- 57 ACAS, *Lindsey Oil Refinery Dispute Report*, above, para 22.
- 58 According to an Office for National Statistics (ONS) based study, EU migrants make up more than 20% of the labour force in 18 British industries: *The Guardian*, 29 July 2017. In the case of agriculture the figure is just under one half.

- 59 ILO Declaration of Philadelphia (1944), Part I(a). See P O'Higgins, 'Labour Is Not a Commodity— An Irish Contribution to International Labour Law' (1997) 26 *Industrial Law Journal* 225.
- 60 See Australian Government, *Report of the Migrant Workers' Taskforce* (2019). Available online.
- 61 ACAS, *Lindsey Oil Refinery Dispute Report*, above, para 14.
- 62 S Lowe, 'Brexit and services – How deep can the UK-EU relationship go?' (Centre for European Reform, December 2018).
- 63 K Marx, 'Instructions for Delegates to the Geneva Congress', above, p. 92.
- 64 Thus the adoption of the Posted Workers Enforcement Directive 2014/67/EU, and the more recent adoption of the Posted Workers Amendment Directive 2018/957 (that will come into force in July 2020) have substantially improved the legal framework that led to extremely bitter and divisive Lindsey dispute. For instance, from 2020 onwards, all the mandatory elements of remuneration (instead of the 'minimum rates of pay'), including rules on accommodation allowances, and expenses, will apply to all posted workers, and any posting longer than 12 or 18 months will have to comply with an extended set of terms and conditions of employment of the receiving Member State. Shorter postings, however, will remain a concern for systems that do not contemplate procedures for declaring collective agreements universally applicable'.
- 65 K D Ewing, J Hendy, and C Jones (eds), *Rolling out the Manifesto for Labour Law* (IER, 2018).
- 66 A Beecroft, 'Report on Employment Law' (2011), p. 4.
- 67 HM Government, 'Guidance Workplace Rights if There's no Brexit Deal', last updated 18 January 2019. Available online.
- 68 HM Government, 'Guidance – Staying in the UK for Longer Than 3 Months if There's no Brexit Deal' (28 January 2019 – Last updated 26 February 2019). Available online. It is worth noting that, on occasion, the current government presided over by Mr Johnson has suggested bringing a hard stop to free movement on 31 October.
- 69 HM Government, 'The UK's Future Skills-Based Immigration System' (December, 2018). Available online.
- 70 TFEU, Article 79(5).
- 71 C Morris, 'Brexit: What is the "No Deal" WTO Option?' *BBC News*, 29 July 2019. Available online.
- 72 HM Government, 'Guidance – Check Temporary Rates of Customs Duty (Tariffs) on Imports After a No-Deal Brexit' (13 March 2019 – Last updated 20 March 2019). Available online.
- 73 K D Ewing, 'The Death of Social Europe' (2015) 26 *King's Law Journal* 76.
- 74 See European Commission, 'The European Pillar of Social Rights in 20 Principles' (17 November 2017). Available online.
- 75 *Ibid.*, Principle 5. It is also provided that 'The transition towards open-ended forms of employment shall be fostered'.
- 76 *Ibid.*
- 77 *Ibid.*, Principle 6.
- 78 Formally the 'Directive (EU) 2019/ [number pending assignment from official journal of the European Parliament and of the Council of [date pending] on the protection of persons reporting on breaches of Union law'.
- 79 M Taylor, 'Good Work: Taylor Review of Modern Working Practices' (2017). For example: 'We have considered a range of penalties designed to punish employers who schedule work

- at late notice, or offer work only to cancel it at the last minute'. However, these tend to have wider implications and would be highly complex to administer and enforce, meaning those who required additional protection may not benefit from any changes' (ibid, p 44).
- 80 HM Government, 'Good Work Plan' (2018), p. 13.
 - 81 A Klair, 'Zero-Hours Contracts are Still Rife', 19 February 2019. Available online.
 - 82 *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, para 70.
 - 83 European Union (Withdrawal) Act 2018, s 6.
 - 84 Case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, 14 May 2019.
 - 85 P De Koster and C Lahaye, 'CCOO vs Deutsche Bank (ECJ C-55/18): Another Piece of the Puzzle for Fundamental Rights Enforcement in Employment Matters?' (Bird & Bird, May 2019).
 - 86 We are grateful to Kate Ewing for this insight.
 - 87 K D Ewing, 'Brexit Threat to Workers' Rights', *Morning Star*, 31 January 2017.
 - 88 Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013, SI 2013 No 763.
 - 89 A Beecroft, *Report on Employment Law* (2011), p. 16.
 - 90 *Evening Standard*, 17 August 2012.
 - 91 *The Guardian*, 22 August 2012.
 - 92 Ibid.
 - 93 *Sunday Times*, 17 December 2017. For fuller analysis, see *Huffington Post*, 19 December 2017.
 - 94 HC Treasury Committee, Oral Evidence, 23 March 2016, HC 499 (2015–2016).
 - 95 *Evening Standard*, 17 August 2012.
 - 96 J-C Tham and K D Ewing, 'Labour Provisions in Trade Agreements : Neo- Liberal Regulation at Work' (2019) 16 *International Organisations Law Review* (forthcoming).
 - 97 Trade Bill 2017–2019.
 - 98 Trade Bill, Lords Amendment 17.
 - 99 ILO, Committee of Experts, Conclusions (1998), and almost every two years subsequently. FTAs have not stopped the current government from bringing forward legislation that amounts to an even more egregious violation of ILO standards, and is currently controversial as a result. For a good account which attracted a lot of media coverage in Australia, see D Blackburn and C Cross, 'Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017' (ICTUR, 2017).
 - 100 K D Ewing and J Hendy, 'TTIP: The Elephant in the Room', CLASSonline Blog, 5 June 2015; also same authors, 'TTIP and Labour Rights', IER submission to the BIS Inquiry into the Transatlantic Trade and Investment Partnership' (21 January 2015).
 - 101 Ewing and Hendy, 'Elephant in the Room', ibid.
 - 102 Ewing, 'The Death of Social Europe' (2015) 26 *King's Law Journal* 76.
 - 103 F Jaumotte and C O Buitron, 'Inequality and Labor Market Institutions' (IMF Discussion Note, 2015); OECD, *Employment Outlook 2018* (2018), esp Ch. 3 ('The Role of Collective Bargaining Systems for Good Labour Market Performance').
 - 104 Case C-438/05, *International Transport Workers Federation v Viking Line ABP* [2007] ECR I- 10779.

- 105 Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I- 11767.
- 106 See above.
- 107 See subsequently *McGowan v Labour Court Ireland* [2013] IESC 21.
- 108 For a more detailed analysis of these cases see M Bell, 'Understanding *Viking* and *Laval*: An IER Briefing Note' (IER, 2008).
- 109 On the BALPA case and its link with *Viking*, see K D Ewing, 'The Draft Monti II Regulation: An Inadequate Response to *Viking* and *Laval*' (IER Briefing, 2012).
- 110 *Govia GTR Railway Limited v ASLEF* [2016] EWCA Civ 1309.
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