**Brexit, Labour Rights and Migration: What's Really at Stake**

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The final days of the UK referendum debate look set to be dominated by social policy, centred on the question of migration, but not confined to that. The overriding issue is now economic insecurity and the dangerous political dynamic it has created.

The Leave side is polling well in areas of the country which have seen relatively little EU migration, such as south Wales and the north east of England, but where job losses, plant closures and the casualisation of wages and working conditions have led to disenchantment with the European project.

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

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

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

EU law is not entirely blameless, however. The freedom EU law gives to enterprises to move across national borders (or at it is known more formally, 'freedom of establishment', along with the ancillary 'freedoms' of services and capital) translates in practice into a right of business to seek out the least 'restrictive' (or 'protective' depending on your point of view) fiscal and regulatory regimes.

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

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

Now consider the relative contributions of EU free movement laws and domestic UK social policy to the degradation of stable work and wages in large parts of the UK labour market. The experience of falling wages and casualisation of work which is being experienced in parts of agriculture (think of farming and food production in Wisbech and Boston) and services (think of Sports Direct's warehouse in Shirebrook or Amazon's many distribution centres) is associated with inward migration from other EU member states, but that is not the only cause.

The movement of labour into the UK is not spontaneous; it is organised along a chain of supply which extends from UK-based employers (many of them multinationals and/or listed companies) to labour market intermediaries operating across EU borders and taking advantage of the rules on freedom of services. In its extreme form this consists of labour trafficking of the kind which until recently was thought to exist only in certain developing countries.

A less extreme but still troubling phenomenon is the practice of employing EU migrants working in the UK on the basis of terms and conditions of employment prevailing in their home states. This practice is encouraged by the EU's rules on the posting of workers, as interpreted by the Court of Justice in its *Laval*, *Rüffert* and *Luxembourg* judgments. These judgments, while highly controversial, enjoyed the support of both the UK government and the European Commission at the time they were delivered (2007-8), and have not been significantly affected by more recent amendments to the posting rules which were largely the initiative of the European Parliament.

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

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

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

Things are not getting better for EU social policy. The Court of Justice, building on its *Laval* jurisprudence, has recently (from 2014) started to treat the minimum standards set out in labour law directives as maxima, thereby preventing member states from adopting more protective rules. This

has already resulted in a tangible weakening of the UK's laws governing protection of terms and conditions of employment following outsourcing and other cases of business transfers, a move with the potential to worsen employment conditions across local government and the NHS and drive a race to the bottom in public procurement. The main justification for the Court's approach to these issues is a newly-discovered right of business to operate without regulatory constraints in what the Court's Advocate General recently described as the EU's 'free market economy'.

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

Is there a way out of this bind for progressive politics? Brexit would not help, since the formal restoration of British legal autonomy (or 'sovereignty' as it is grandly but misleadingly termed) would provide no guarantee of a switch of direction in social policy. Depending on which kind of relationship the UK might have with the EU post-Brexit, many of the same single market rules which are the cause of the problem would still apply, but possibly without the social protections currently guaranteed by EU law, depending on how post-Brexit negotiations go. If the UK exited the single market altogether it would have complete freedom to disapply EU labour laws. British workers would then be significantly worse off, although given the current failure of EU law to provide a break on the UK's lax labour regulation regime, this is a difference of degree, not kind.

Should a social democratic response be to reopen the issue of free movement for labour, as recommended by senior Labour Party politicians as the Brexit debate enter its final week? Free movement has never been an unqualified right, and it is entirely possible for many aspects of the social security and labour law regimes governing migrant and posted workers to be reassessed, without breaching the fundamental rights set out in the EU Treaties.

But it follows from the analysis set out above that this would only address part of the problem. It is the rules governing free movement for capital, not just labour, which must be reconsidered. The principle of freedom of establishment, together with the ancillary right to provide services across borders, has been twisted out of shape by a combination of legally dubious judgments and ill-considered legislative initiatives over the last decade.

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