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BREXIT AND SOCIAL RIGHTS

ABSTRACT

This article will consider the role of EU social rights in the the referendum campaign, what will become of social rights in the post Brexit world in the light of the EU (Withdrawal) Bill and the commitment to no-regression of social rights and what the EU might require in the event of a future trade deal. It will argue that while the future may look somewhat bleak for the maintenance of EU social rights, the imminent catastrophe that some fear will not happen. Instead there is a risk of stagnation of existing employment rights and a gradual erosion of the protection employees currently enjoy, especially if there is no robust requirement on the UK to continue to respect EU employment law rules.

KEYWORDS : *Brexit, Social Rights, Trade Deals.*

RÉSUMÉ

Cet article examinera le rôle des droits sociaux de l'Union Européenne au cours de la campagne de référendum, ainsi que ce qu'il adviendra des droits sociaux dans le monde post-Brexit à la lumière du projet de loi (retrait) de l'UE, de l'engagement de non-régression des droits sociaux et de ce que l'UE pourrait exiger dans l'éventualité d'un futur accord commercial. Cet article démontrera que même si l'avenir peut sembler quelque peu sombre pour le maintien des droits sociaux de l'UE, la catastrophe imminente que certains craignent ne se produira pas. Au lieu de cela, il existe un risque de stagnation des droits sociaux existants et une érosion graduelle de la protection dont bénéficient actuellement les salariés, surtout si le Royaume-Uni n'est plus contraint de continuer à respecter les règles du Droit social européen.

MOTS CLÉS : *Brexit, droits sociaux, accords commerciaux.*

It might have been thought that concerns about loss of EU social rights, in the event of a vote to leave the EU, would have featured prominently in the Remain camp's approach to the UK's referendum. They did not. Social rights played merely a walk on role. This article will consider first, why social rights did not feature more prominently during the referendum campaign (I), second, what will become of social rights in the post Brexit world in the light of the EU (Withdrawal) Bill and the commitment to no-regression of social rights (II), and third what the EU might require in the event of a future trade deal (III). I will argue that while the future may look somewhat bleak, the imminent catastrophe that some fear will not happen but instead there is a risk of stagnation of existing employment rights and a gradual erosion of the protection employees currently enjoy, especially if there is no robust requirement on the UK to continue to respect EU employment law rules.

I - WHY DID SOCIAL RIGHTS NOT FEATURE MORE PROMINENTLY DURING THE REFERENDUM CAMPAIGN?

The expected flag-wavers for Remain – the trade unions – were in fact cautious about running arguments in favour of EU social rights, let alone about fighting for a Remain vote. This was in part due to a recognition that many trade union members and activists supported the Leave campaign. Many members had been concerned about the implications of EU membership. They were worried about 'unrestricted' EU migration which, they perceived, was having a negative effect on wages. As one trade union official put it after the referendum: 'workers have always done best when the labour supply is controlled and communities are stable'¹.

Trade union members were also worried about the negative effects that globalisation – and its local manifestation Europeanisation – was having on the manufacturing sector. They saw jobs disappearing either abroad. More generally they were concerned about a growing casualization of employment². The decline in manufacturing jobs coincided with the rise in immigration. The year of the referendum witnessed the highest level of immigration to the UK. Often those (better educated) immigrants were taking the low skilled work which might have been available to recently unemployed British workers. This added to the sense of resentment. The trade unions recognised this was a pretty lethal cocktail of events³.

The trade unions themselves were not unanimously in favour of EU membership. While the EU had granted some significant new rights to workers, the EU information and consultation rights had the potential to sideline trade unions. Further, the decisions of the

1 *The Guardian*, 16 December 2016, cited in K. Ewing, "Implications of the Post - Brexit Architecture for Labour Law", *Kings Law Journal* forthcoming, 2018.

2 See M Taylor, *Good Work: The Taylor Review of Modern Working Practices*, 2017.

3 <http://blog.policy.manchester.ac.uk/posts/2017/08/trade-unions-eu-workers-and-brex-it-more-complexity-less-certainty/>

Court of Justice in the (in) famous *Viking* and *Laval* line of case law⁴ had left a bad taste: the effect of these rulings was to make strike action in the UK with a transnational element even harder than it was under the already strict domestic law. And trade unions also saw the way the EU had behaved towards Greece during the financial crisis: the terrible effect of austerity policies as well as the forced reduction in national social standards, including collective bargaining,⁵ prompted a number on the left to advocate leaving the EU (so-called 'Lexit').

There was a tactical element too. Trade unions recognised that repeatedly pushing the argument that the EU had provided important social rights in fact played into the hands of those supporting Leave. Leave supporters argued that EU employment rights were a symbol of the extent to which the UK had 'lost control' of 'our laws'. Leave supporters could tie those concerns up with more general fears about excessive regulation: not only were these 'foreign' rules but they also imposed (unnecessary) burdens on UK business. This was summed up by one prominent leaver, Priti Patel MP, who said in the campaign: 'If we could just halve the burdens of the EU social and employment legislation we could deliver a £4.3 billion boost to our economy and 60,000 new jobs'. Francis O'Grady, General Secretary of the TUC and a prominent Remain supporter did come out fighting: 'Leave the EU and lose your rights at work - that's the message that even Leave campaigners like Priti Patel are now giving. But which rights would go - your right to paid holidays, your right to parental leave, maybe protections for pregnant workers? The EU guarantees all these rights and more, and it's why Brexit is such a big risk for working people.' Ten general secretaries of some of the largest trade unions did come out to support her and called for a Remain vote⁶. But it was too little, too late.

II - THE FATE OF SOCIAL RIGHTS POST BREXIT

Following the vote to leave the EU, it was widely expected that the Working Time Regulations, implementing the Working Time Directive, one of the pieces of EU legislation most loathed by employers⁷, would be repealed with speed post Brexit, shortly followed by the Agency Work and Fixed Term Work Regulations⁸. It therefore came as something of

4 Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* [2007] ECR I-10779 and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, *Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767. For a discussion of the corrosive effects of the decision on UK labour law, see C. Barnard, 'British Jobs for British Workers': The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market', *ILJ*, 2009, n° 38, p. 245.

5 <https://www.theguardian.com/politics/2016/jun/21/the-labour-case-for-a-leave-vote-in-the-eu-referendum>

6 UK trade unions urge vote against Brexit.

<https://www.politico.eu/article/eu-referendum-leave-remain-uk-trade-unions-brexit-news-uk-politics/>

Their letter appeared in the *Guardian*: <https://www.theguardian.com/politics/2016/jun/05/trade-union-members-should-vote-to-stay-in-the-eu>

7 *Sunday Times*, 17 December 2017; *Sun on Sunday*, 17 December 2017. For fuller analysis, see *Huffington Post*, 19 December 2017, all cited in K. Ewing, above n° 1.

8 See generally M. Ford, 'The Effect of Brexit on Workers' Rights', *King's Law Journal*, 2016, n° 27, p. 398.

a surprise when the Prime Minister announced that social rights would be retained in the post-Brexit world. In her party conference speech in October 2016, she said: “As we repeal the European Communities Act, we will convert the ‘acquis’ ... into British law. When the Great Repeal Bill [now EU (W)B] is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. ... *And let me be absolutely clear: existing workers’ legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.* (emphasis added)

This political commitment was reiterated in the Brexit White Paper⁹: “As we convert the body of EU law into our domestic legislation, we will ensure the continued protection of workers’ rights. This will give certainty and continuity to employees and employers alike, creating stability in which the UK can grow and thrive.

More recently in her Mansion House speech, she said¹⁰: “And in other areas like workers’ rights or the environment, the EU should be confident that we will not engage in a race to the bottom in the standards and protections we set. There is no serious political constituency in the UK which would support this – quite the opposite.

Well there is a constituency even within the Cabinet who are opposed to employment rights. For example, Liam Fox, the Secretary of State for International Trade has said ‘*To restore Britain’s competitiveness we must begin by deregulating the labour market. Political objections must be overridden*’¹¹. However, so long as Theresa May remains Prime Minister employment rights look fairly safe and the language of non-regression is starting to be used. But are social rights safe? For the time being, the most important guarantee of protection of employment rights is the EU (Withdrawal) Bill (EU (W) B).

A - THE RETAINED EU LAW

The EU (Withdrawal) Bill, which is currently going through parliament, is intended to take the UK out of the EU at domestic level while ensuring legal certainty and continuity on the day after Brexit day, including in the event of a no deal. Specifically, its aim is to take a snapshot of EU law as it stands at the time of Brexit and carry it over into domestic law. Thus, Clause 2(1) provides that ‘EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.’ EU-derived domestic legislation includes legislation adopted under the powers laid down in s.2 (2) of the European Communities Act (ECA) 1972, the Act which took the UK into the EU in the first place. Section 2(2) is a so-called ‘Henry VIII clause’ (named after the famous British King of that name) which allows the executive to implement EU law as secondary legislation (usually Statutory Instruments (SIs)) without going through the full process of an Act of Parliament. So the Working Time Regulations, which implemented the Working Time

9 HM Government, The United Kingdom’s exit from and new partnership with the European Union (Cm 9417, February 2017)

10 <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>

11 <https://www.ft.com/content/2ee5b8de-5c8d-11e1-8f1f-00144feabdc0#axzz1mtrhfavw>

Directive, were implemented under section 2(2) powers and will remain on the UK statute book as a result of Clause 2 of the EU (W) B. Clause 2 of the EU (W) B will also save other legislation implementing EU law which was adopted under other powers, such as the Fixed Term Work Regulations which were adopted under provisions of the Employment Act 2002. Primary legislation giving effect to EU law, such as the Equality Act 2010, will also continue in force. This body of law is referred to as 'retained EU law' (Clause 6(7) EU (W) B) and will be subject to amendment by Parliament at a future date (unless there is a future deal which precludes this – on which see section 4 below).

So Clause 2 of the EU (W) B provides the legal mechanism to ensure that EU social rights will continue in force after the UK leaves the EU, whether this be on 29 March 2019 if there is no deal or 31 December 2020 at the end of the transition period (under Part IV of the Withdrawal Agreement EU law will continue to apply to the UK as if the UK were a Member State during transition). So far, so straightforward. However, not all EU laws can be retained in their current form. Take, for example, the Transnational Information and Consultation of Employees (TICE) Regulations of 1999¹² and amended in 2010¹³. The Regulations were both adopted under the powers laid down by s.2 (2) European Communities Act (ECA) 1972. These require a multinational company or, using the jargon, a '*Community-scale undertaking*'; to set up a European Works Council or equivalent for the purposes of providing information to, and consulting with, worker representatives. However, the definition of a *Community-scale undertaking* in the UK legislation is an undertaking with 'at least 1000 employees within the *Member States* and at least 150 employees in each of at least two *Member States*'. As the UK will no longer be a member state, this raises a problem.

B - REMEDYING 'DEFICIENCIES IN UK LAW

Clause 7 of the Bill gives the government the power to deal with so-called 'deficiencies' in existing law where the executive thinks it is 'appropriate' to do so. However, these so-called 'Henry VIII' powers are controversial because they are exceptionally wide¹⁴ and allow the government to amend both statutory instruments (SIs) (ie secondary law) and Acts of Parliament (ie primary law), thus giving 'ministers far greater latitude than is constitutionally acceptable'¹⁵. However, during the Commons debate, the Government conceded that there would need to be a new parliamentary committee to sift statutory instruments introduced to amend retained EU law. The committee will decide whether the se SIs should be subject to the negative or affirmative procedure (the latter requires approval by both Houses of Parliament). The House of Lords, for its part, does not consider these safeguards sufficient and wants more.

Nevertheless, Clause 7 will be retained in some form and the UK might decide to use Clause 7 powers to remove Regulation 4(1) of TICE on Community scale undertakings where the central management is situated in the UK and it might remove Regulation 5 on central management or representative agent situated in the UK. Trade unions hope that, following the principle of no-regression, the employment protection provisions in the TICE

12 <http://www.legislation.gov.uk/ukxi/1999/3323/introduction/made>

13 <http://www.legislation.gov.uk/ukxi/2010/1088/contents/made>

14 <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/1906.htm>

15 <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/6903.htm#idTextAnchor003>

Regulations will not be repealed. However, all of this is subject to any future deal which is struck between the UK and the EU (see further section 4 below).

Although Clause 7 empowers the Minister of the Crown to prevent, remedy or mitigate—(a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU, there is concern that a Minister might use these powers to make more substantive policy changes in the guise of remedying a deficiency. There are particular fears that provisions of the Equality Act 2010 might be under threat. There is therefore pressure that the Equality Act should be added to the list in Clause 7(7) which says that Clause 7(1) powers cannot be used in certain areas including not to be used to amend, repeal or revoke the Human Rights Act 1998 which incorporates the European Convention on Human Rights into UK law.

C - THE CHARTER

Despite the key idea underpinning the EU(W)B of continuation, not divergence, at least at the beginning, the notable exception is with the Charter of Fundamental Rights. Clause 5(4) provides: 'The Charter of Fundamental Rights is not part of domestic law on or after exit day.' However, Clause 5(5) provides this does not affect the retention in domestic law on or after exit day of any fundamental rights or principles which exist irrespective of the Charter. It adds that references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles. So although the Charter is not retained after Brexit, the general principles it embodies will be. Schedule I, clause 2 provides further details: it provides that no general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case). Furthermore, unlike rights arising from the Charter, where there can be an action for damages in the event of a breach, Clause 3 of Schedule I provides 'There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law'. Further, no court or tribunal or other public authority may, on or after exit day—(a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.

For good measure, Clause 4 adds 'There is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.' So not only is the Charter gone but so are some of the key remedial principles, in particular the rules in *Francovich* and *Mangold*.

What about loss of Charter rights? Labour lawyers have been somewhat ambivalent about the Charter of Fundamental Rights¹⁶. While Title IV on Solidarity held much promise, in fact its content and application have been disappointing¹⁷. In perhaps the most controversial case, *Alemo-Herron*¹⁸, a reference from the UK courts about the interpretation

16 C. Barnard, "The Silence of the Charter" in S De Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, Hart Publishing, Oxford 2015.

17 Case C-426/11, *Alemo-Herron v Parkwood Leisure*, ECLI:EU:C:2013:521; Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972.

18 *Alemo-Herron and Others v Parkwood Leisure Ltd*, above n° 17, paras 31-35.

of the UK's more generous implementation of the Transfer of Undertakings Directive, the Court used the Article 16 right to conduct a business to challenge and remove that higher protection since it was deemed to interfere with the employer's managerial freedom. At no stage did the Court consider the application of any of the provisions in the solidarity title as a counterweight to the employer's Article 16 right. The rights in the Equality Title have, however, offered more promise and have been used to the greater benefit of workers¹⁹, although here at least the general principle of equality has a longer and more established provenance.

D - THE ROLE OF THE COURTS

Clause 1 of the EU (W) B repeals the ECA 1972. This puts an end to the principles of supremacy and direct effect in the UK legal system (principles which will have to be turned back on during any transition period, something which will be delivered by a separate piece of UK legislation called the Withdrawal and Implementation Bill (WAIB)). However, the picture is not as clear as would first appear. Clause 5 provides that while the principle of the supremacy of EU law does not apply to any enactment passed after Brexit it does still apply to the 'interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day'. So this means that if the British courts find in a particular case that the Equality Act 2010 - which was passed pre-Brexit - has provisions which contravene, say, Article 157 TFEU then Article 157 TFEU will prevail. The main difference is that post Brexit, the UK will be free to legislate to reverse the effects of any such finding (subject to the terms of any future trade deal - see section 4 below).

What about the relevance of the case law of the Court of Justice? In respect of pre-Brexit case law it will continue to apply as UK law (as British law, though as British law it may be overturned by the UK Supreme Court)²⁰. However, the position of post-Brexit case law is more complicated. Clause 6 provides that a court or tribunal is (a) not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day (there will, of course, be no enforcement actions under Article 258 TFEU either). Further, Clause 6(2) provides: A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.

So, post-Brexit the British courts are not bound by rulings of the Court of Justice, nor can they make Article 267 references but they can have regard to those decisions if they consider it 'appropriate'. The judges are deeply worried about the power this gives them. They fear that a decision as to when to take ECJ decisions in to account will become political, not legal and will put them on the frontline of media attacks. They would like the language of this provision changed.

But perhaps these concerns are overstated, at least in the employment field²¹. British judges have never slavishly followed Court of Justice rulings, especially where they do not

¹⁹ Case C176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2.

²⁰ Clause 6(4) and (5) EU(W)B.

²¹ The following section is taken from C. Barnard, «Brexit and Employment law» in M. Dougan (ed), *The UK after Brexit*, Intersentia, 2017.

think them sensible. A good example is *ECM*²², where the Court of Appeal took a pragmatic line to managing the challenges of the much-criticised decision of the Court of Justice in *Süzen*²³ in determining whether a transfer of an undertaking had occurred in the case of a labour-intensive business. The Court of Justice's decision used the criteria of whether the majority of staff had been transferred to determine whether there was a transfer of an undertaking which would have triggered the transfer of those very staff. In other words, the reasoning was circular. The Court of Appeal preferred the smorgasbord approach adopted by the Court of Justice in the earlier *Spijkers* decision²⁴, which involved considering a range of factors, in determining whether a transfer of an undertaking had occurred and thus whether those staff should be transferred.

In *Govia*²⁵, too, the Court of Appeal drew the teeth of the controversial Court of Justice decision in *Viking*²⁶. *Viking* had had damaging consequences on the right to strike in the UK²⁷. In *Govia*, the Court of Appeal had to consider whether the proposed strike action to be taken by trade unions over the introduction of Driver Only Operated passenger Trains (DOOP) would breach Article 49 TFEU, the argument being that a French company, Keolis, owned 35 per cent of Govia's shares and the strike action interfered with the exercise of its freedom of establishment rights. The Court of Appeal said: 39. ...[I]t is the object or purpose of the industrial action and not the damage caused by the action itself which renders it potentially subject to the freedom of movement provisions. In our judgment it is inconceivable that a rule which did not discriminate on grounds of nationality and which required a driver and a guard on all trains to ensure the safe closing of doors rather than just a driver, could be said to constitute a deterrent to freedom of establishment or to make it less attractive.'

The Court of Appeal then pointed out that, even where a measure operated to the detriment of a person, that would not justify an inference that its freedom of movement had been infringed if the effect was either too uncertain, indirect or insignificant to have the requisite deterrent or dissuasive impact. The Court concluded, '[w]e have no doubt that it would be too insignificant here'.

So it may be that the British courts, post-Brexit, will feel more liberated and able to do more of the same, shaping the post-Brexit case law to better fit the circumstances of the UK labour market, including in respect of controversial matters such as rolled-up holiday pay²⁸ (where short-term contracts included a sum for holiday pay 'rolled up' in them, a pragmatic solution which the Court of Justice found unlawful²⁹). However, the Swiss experience is instructive. Officially, judgments of the Court of Justice are persuasive only. For a number of years, this meant that an equivalent Swiss judgment was needed to explain what effect

22 *ECM v Cox* [1999] IRLR 559.

23 Case C-13/95, *Süzen v Zehnacker Gebäudereinigung GmbH*, ECLI:EU:C:1997:141, para 15.

24 Case 24/85, *Spijkers v Benedik*, ECLI:EU:C:1986:127.

25 *Govia v The Associated Society of Locomotive Engineers* [2016] EWCA (Civ) 1309.

26 Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.

27 For a summary, see C. Barnard, «The Calm after the Storm. Time to Reflect on EU Scholarship after Viking and Laval», in A Bogg, C Costello and A Davies (eds), *Research Handbook on EU Labour Law*, Elgar, Cheltenham 2016.

28 <https://www.gov.uk/holiday-entitlement-rights/holiday-pay-the-basics>

29 Case C-131/04, *C D Robinson-Steele v R D Retail Services Ltd*, ECLI:EU:C:2006:177.

the Court of Justice's judgment had in Switzerland. Because this became unmanageable, in 2009 the Swiss Supreme Court ruled that the judgments of the Court of Justice would apply unless there was a good reason why they should not³⁰. In fact, the Swiss courts apply the judgments of the Court of Justice pretty faithfully. Failure to do so, they recognise, means that Swiss law will not keep up to date with EU law. Crucially, in the light of any future EU-UK trade deal, the Swiss recognise that non-compliance might also jeopardise the Swiss' trade relations with the EU.

Finally, what if there is genuine uncertainty as to what EU law means in the absence of the Article 267 TFEU reference procedure? Recourse to an EU-UK joint committee might be one solution, but this committee might not have judges on its panel. Given the general reluctance of British courts to refer cases to the CJEU, it may be that British judges make the best of it and decide the cases for themselves. Decisions like *Govia* and *ECM* suggest that the outcomes may not necessarily be bad for employees.

III - THE FUTURE

In her Lancaster House speech³¹, Theresa May said that the UK Government will build on the rights laid down in European legislation³². The Brexit White Paper elaborates on this, noting that the past few years have seen a number of independent actions by the Government to protect UK workers and ensure they are being treated fairly, and in many areas the UK Government has already extended workers' rights beyond those set out in EU law. It cites, by way of example the fact that:

- UK domestic law already provides for 5.6 weeks of statutory annual leave, compared to the four weeks set out in EU law;
- in the UK, women who have had a child can enjoy 52 weeks of statutory maternity leave and 39 weeks of pay, not just the 14 weeks under EU law;
- the UK provides greater flexibility around shared parental leave, where, subject to certain conditions, parental leave can be shared by the father of a child, giving families choice as to how they balance their home and work responsibilities; and
- the UK offers 18 weeks' parental leave, and that provision goes beyond the EU Directive because it is available until the child's 18th birthday³³.

30 Judgment of the Swiss Federal Tribunal (136 II 5), discussed in T. Burri, «Do Lawyers Knead the Dough? How Law, Chaos and Uncertainty Interact» 4 *European Journal of Risk Regulation* 2010, p. 371. See also T Burri, "Brexit addendum: Why the "Great Repeal Bill" will not be so great' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2966683

31 <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

32 See also the commitments in the Conservative manifesto Conservative Party, Forward Together: The Conservative Manifesto (2017) at, for example, p 7.

33 *The United Kingdom's exit from and new partnership with the European Union*, above n X, Section 7.

The White Paper also notes that the Government is committed to 'strengthening rights when it is the right choice for UK workers and will continue to seek out opportunities to enhance protections'³⁴. It pointed out that in April 2016 the government introduced the National Living Wage as well as increasing penalties for wilfully non-compliant employers³⁵.

All of this is true; none of these developments have been required by EU law nor constrained by it. EU employment law lays down minimum standards, not maximum, and is in any event an incomplete legal regime. There are whole areas of social policy which are unaffected by EU law³⁶. Member States have considerable freedom to do what they want in the social field, as the UK has already done while still a member of the EU. Brexit in and of itself will not create opportunities for developing social policy which were unavailable prior to the referendum.

More remarkable is the statement in the White Paper that '[w]e are committed to maintaining our status as a global leader on workers' rights and will make sure legal protection for workers keeps pace with the changing labour market'³⁷. According to the OECD league tables, the UK is ranked third in its employment protection legislation table (with a score of 1.10 in 2013) for the *least* regulation in the field of individual and collective dismissal (after the US (0.26 in 2013) and Canada (0.92 in 2013))³⁸, a point the UK has noted with some pride in its *Ending the Employment Relationship* Consultation³⁹. Further, the UK continues to make its employment law more flexible, notably by lengthening the periods of service necessary to claim unfair dismissal, increasing the carve-outs from the right to claim unfair dismissal, and most significantly, imposing fees on access to employment tribunals. Claims dropped by 70 per cent⁴⁰ until the Supreme Court declared the rule unlawful⁴¹. This is leadership of a sort but most trade union lawyers would not regard it as constituting global leadership in terms of the *protection* of employment rights.

Moreover, it is striking that these developments have occurred in areas in which the UK is not constrained by the floor of protection provided by EU law, namely unfair dismissal and the management of access to tribunals. This raises the question as to what will happen when

34 Ibid, par. 7.3.

35 Ibid, par. 7.4-7.5.

36 See generally J Kenner, *EU Employment Law. From Rome to Amsterdam and Beyond*, Hart Publishing, Oxford 2003.

37 *The United Kingdom's exit from and new partnership with the European Union*, above n° 10, par. 7.6.

38 http://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV. The OECD average figure was 2.04.

39 BIS, *Ending the Employment Relationship Consultation*, 2012: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32700/12-1037-ending-the-employment-relationship-consultation.pdf), p. 13.

40 See eg 'Unions blame 70% fall in employment tribunal cases on fees', *The Guardian*, 31 January 2017

<https://www.theguardian.com/money/2017/jan/31/employment-tribunal-cases-down-70-since-fees-introduced>. See further A Adams and J Prassl, 'Vexatious Claims? Challenging the Case for Employment Tribunal Fees', *Modern Law Review*, 2017, n° 80, p. 412.

41 *R (on the application of UNISON) (Appellant) v Lord Chancellor* [2017] UKSC 51.

Theresa May is no longer Prime Minister (or if the negotiations go badly). Will employment law, in the hands of a Conservative Government, mean in fact deregulation, as Liam Fox and Priti Patel have called for, or at least a continued process of salami slicing away of rights (eg reducing the personal scope of the protection from worker to employee or increasing the length of service requirement before an employee can take advantage of the right)?

The Prime Minister, in her Lancaster House speech, also talked about legal protection for workers keeping pace with the changing labour market. She subsequently referred to worker representation on boards of companies. This suggests a more progressive approach to labour rights (although this proposal has already run into *difficulties*),⁴² as does the subsequent reference to enhancing rights for workers. But what if the economy goes into recession following Brexit? Do such changes in the labour market mean in fact deregulation of workers' rights? This risk is exacerbated if no trade deal is reached with the EU.

As far as a trade deal with the EU is concerned, the Political Guidelines issued on 23 March 2018 provide⁴³: Given the UK's geographic proximity and economic interdependence with the EU27, the future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field. The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, social, environment and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness.

This raises as many questions as it answers. The EU clearly wants the UK to stay close to its regulatory regime in the social field but whether this means continuing to respect the existing *acquis* as well as the future social *acquis* or whether it means complying with core ILO standards is not spelled out. And, in the absence of a trade deal with the EU which demands high social standards, the results are potentially serious. As Ewing puts it⁴⁴: The agenda being driven by the Right [in the UK] is for bilateral free trade agreements to replace the UK's membership of what is the biggest free trade arrangement in the world; in doing so they are promoting free trade not fair trade, free markets not social markets. The result will be a new legal order, which will embed different kinds of constitutional challenges and labour standards, but which will offer no restraints on the erosion of the latter.

42 'Plans to put workers on company boards falters', *Financial Times*, 31 October 2016

<https://www.ft.com/content/22128636-9ece-11e6-891e-abe238dee8e2>

Although Sports Direct has decided to put workers on its board, *Financial Times*,

<https://www.ft.com/content/d4d713ca-04ab-11e7-ace0-1ce02ef0def9>

However, the commitment is reiterated in the Conservative manifesto 2017

<https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf>

43 <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>, par. 12.

44 K. Ewing, above n.1.

Conclusions

UK workers have benefitted very much from the protection provided by EU social law and by the enforcement of those rights by the Commission and the Court of Justice. In the absence of a future deal which requires future alignment with EU social rights, UK workers remain vulnerable to the changing attitudes of the Westminster parliament to worker protection. The international legal regime is weak – the European Social Charter and the ILO offers significantly weaker protection than EU law and the remedies of enforcement are extremely weak. Despite trade union members' ambivalence towards the EU, in the absence of a politically supportive government, they will continue to be dependent on the EU directly or indirectly to improve labour standards.

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