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BOOK REVIEW

Posted Work in the European Union: The Political Economy of Free Movement, Jens Arnholtz, Nathan Lillie (Routledge, 2019, 226 pp.)

reviewed by Vladimir Bogoeski†

Posted Work in the European Union: The Political Economy of Free Movement, a recent edited volume, makes an interdisciplinary intervention into the discussion of posting of workers in the EU. Released in a timely way after the adoption of the Revision of the Posted Workers Directive (PWD),[1] it advances the argument that posting of workers has driven institutional change from below, both at the national and at the EU level (Chapter 1). The argument is further fleshed out and supported through different examples and case studies in the course of nine chapters. The review will proceed in three steps. First, I will briefly outline the context of the posting of workers problématique. Second, I will identify the contributions that the volume makes to the existing literature and discussion. Third, I will engage with the argument and the elaborations in the separate chapters.

POSTED WORK IN THE EU: CONTEXTUAL BACKGROUND

Posted work or posting of workers in the European Union (EU) is a special mode of labor mobility under EU's regulatory framework of free movement of services.[2] This freedom enables companies (or individuals) based in an EU Member State to export their services across borders, by sending i.e. 'posting' their workers to another Member State to carry out contracts for services during a limited period of time. The essential difference between posting of workers (Article 56, TFEU) and free movement of workers (Article 45, TFEU) is that the latter regime of labor mobility is

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1. *See* Chapter 9 in this volume; 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 (Text with EEA relevance), 2018 O.J. (L 173) 16 (EU).

2. Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), art. 56, 2012 O.J. (C 326), 47, 70.

anchored in the equal treatment principle. On the contrary, the employment relationship of posted workers remains primarily regulated by the legal regime of their country of origin and only minimum protection standards of the host country, listed in the original PWD[3] and extended through the Revision, apply to them during the posting period.

The existing regional inequalities between EU's core and peripheries,[4] and the limited application of host state labor standards as a specific feature of the posting model have turned posting of workers into one of the most contested questions of EU labor law and social policy.[5] Chapter 2 of the present volume reminds us of the benefits of posting and its multidimensionality. Nonetheless, the posting from low-wage to high-wage Member States (from the peripheries to the core) turns it into a matter of contestation, widely (in)famous in EU studies at least since the "Laval Quartet" rulings.[6]

Since the southern enlargement in the 1980s[7] posting has become a method of workplace fissuring[8] and thus central in the discourse on 'social dumping' in the EU.[9] Conflicts have arisen as to what legal rules to apply to posted workers in order to satisfy both established workers' protection standards in the Member States and free movement imperatives of the 'completing' internal market.[10] Over the decades, due to a high level of politicization and the actual challenges it has gradually posed to the integration process, posting has attracted broad scholarly attention generating its own subfields of research in a variety of academic disciplines. From labor law and general EU law, to industrial relations, social policy and migration studies, scholars have grappled not only with the effects of posting on domestic and EU labor law, industrial relations institutions, worker rights and welfare, but also with its broader implications on the overall development of the social dimension of the EU integration process.

Against this backdrop, the point of departure of the present volume is the existing cleavage between the interests of mainstream literature in formal

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3. 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, art. 3, 1997 O.J. (L 18) 1, 3.

4. On the core-periphery dynamics in the EU, see the discussion in Damjan Kukovec, *'Law and the Periphery,'* 21 Eur. L.J. 406 (2015).

5. See the discussion in MARCO ROCCA, POSTING OF WORKERS AND COLLECTIVE LABOUR LAW: THERE AND BACK AGAIN (2015).

6. The scholarship analyzing these rulings is vast. For a glimpse into the mount of law studies on them, see Catherine Barnard, *'The Calm after the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in Viking and Laval,' in* RESEARCH HANDBOOK ON EU LABOUR LAW (Alan Bogg, Cathryn Costello & ACL Davies eds., 2016). *See also* ROCCA, *supra* note 6.

7. The southern enlargement refers to the accession of Spain and Portugal in 1986.

8. On the notion of 'fissuring' see DAVID WEIL, THE FISSURED WORKPLACE (2014).

9. Magdalena Bernaciak, *'Social Dumping and the EU Integration Process'* (Eur. Trade Union Inst., Working Paper 2014.06, 2014).

10. *See Completing the Internal Market: White Paper from the Commission to the European Council*, COM (1985) 310 final (June 19, 1985).

rule change and the fact that most institutional change in posting occurs through practices from below: namely through the business strategies of companies and resistance strategies by institutions or ultimately individuals, such as unionists and labor inspectors.

POSTED WORK AS A DRIVER OF INSTITUTIONAL CHANGE FROM BELOW

Considering the breadth of the existing literature on posting, it is remarkable that *Posted Work in the European Union* succeeds in introducing a compelling novel perspective on the topic, making theoretical, methodological and empirical contributions to the ongoing discussion. I discern four such contributions.

I locate the first, presumably less obvious contribution in introducing the notion "political economy of free movement" as a direction to reflect on the effects of posting on different aspects of 'the social', at both EU and Member State level. While the idea that EU free movement rights not only affect individuals, but also have implications for the political economy of both the Member States and the EU might appear as self-evident, approaches that embed posting in political economy and at the same time remain attentive to the intricate details of its manifold manifestations are indeed rare.

The second contribution is conceptual, as the book conceptualizes posted work in the EU as a "driver of institutional change from below" (Chapter 1) and uses it as an analytical lens to examine the impact of posting on the different institutions and actors involved.

The third one is methodological. Unlike large part of the posting literature that approaches the topic studying the EU legal framework on posting and the judgements of the Court of Justice of the EU (CJEU), the methodological approach of the present volume is tracing "institutional change from below." Most chapters (see Chapters 3, 4, 5, 6 and 7) apply this method to disentangle how different manifestations of posting of workers on the ground in different national contexts affect the various institutions and actors involved.

The fourth contribution is empirical, as most authors, guided by the proposed conceptual and methodological framework, study concrete examples of the impact of posted work on regulatory developments, institutions and workers at EU and Member State level.

Although the notion of the "political economy of free movement rights" itself is not explicitly developed in the book, framing posting of workers as a question of political economy helps us see it as a product of a particular legal framework and specific (institutional and individual) practices, and not as a 'natural' condition inherent to the internal market. The political economy framework captures the greater complexity of the posting problématique, implying that it is bigger than the dichotomy of free movement of firms v. workers' rights, as it affects the capacity of legitimate institutions and actors

to successfully perform their function of socially embedding the EU's and Member States' markets.[11] The political economy framing transcends and at the same time unifies the different approaches such as labor rights, EU law, sociological approaches to migrant work etc. and will hopefully invite future research to further advance it theoretically and empirically.

In this context, the main argument advanced by this volume is that posting of workers, through its particular legal framework and the development of different practices on the ground, is driving a multi-level process of institutional change. While the mainstream literature, the editors of the volume in Chapter 1 submit, has mainly looked at how formal rules on posting have shaped the reality on the ground, there is also much to understand about how the functioning of the regulatory regime has been shaped from below, by companies, individuals, unionists, labor inspectors etc. Building on theories of incremental institutional change,[12] which explain the process of changes in everyday practice while formal rules remain the same, this volume's conceptual framework and the empirical findings aim at explaining, how both institutional change and EU integration more broadly are driven from below.

The Norwegian case presented in Chapter 3 clearly illustrates what the authors of the conceptual framework of posting as a driver of institutional change had in mind. After the East enlargement, Norwegian ship building companies sustained their competitiveness through recruitment of posted workers from the new Member States from Central and Eastern Europe. This practice has expectedly put downward pressure on wages and labor standards in Norway, which was countered by the government's response to unions' demands, extending mandatory collective agreements at national level. Contrary to the more intuitive assumption that employers would seek to undermine this blocking of regulatory arbitrage by simply engaging in regulatory evasion, they opted instead for a strategy of regulatory compliance and contestation, re-employing posted workers and (unsuccessfully) contesting the extension of collective agreements before national courts and the European Surveillance Authority.

One of the main effects of posting of workers has been the dualization of the labor market (see more in Chapter 10), namely creating core and peripheral workers, where the latter largely remain out of reach for trade unions, both in terms of rights enforcement and representation. This fragmentation of the labor force at the same workplace has inevitably weakened trade union political power and unions' capacity to enforce labor standards and set further social objectives. Chapter 5 demonstrates how

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11. "Embeddedness" in the tradition of KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2nd ed., Beacon Press 2001).

12. Wolfgang Streeck & Kathleen Thelen, *'Introduction: Institutional Change in Advanced Political Economies,' in* BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 1, 1–39 (Wolfgang Streeck & Kathleen Thelen eds., 2005), referred to in Chapter 1, 13.

unions in the construction industry of four Member States from Western Europe adopted different strategies in an attempt to respond to rule evasion by employers under the posting framework and increase rights enforcement for posted workers. Depending on the different institutional setup of the variety of capitalism within which particular trade unions have operated,[13] with greater or lesser success they focused on rights enforcement by re-enacting different mechanisms available in the respective industrial relations system.

While scholarship has mostly focused on posting's effects on trade unions, two chapters of this volume bring in a neglected but a truly important actor back into the picture—namely the labor inspectorates. While in the Italian case (Chapter 6) the issues related to posting melt into the plethora of labor market irregularities and hardly are a priority for labor inspectors, the Dutch case study (Chapter 7) offers a rich analysis of labor inspectorate's struggle to enforce labor and social security regulation in the face of a variety of challenges related to posting. Years of regulatory arbitrage and evasion led to legal intervention at EU level that resulted in the adoption of the Enforcement Directive in 2014.[14] However, although it offered some enforcement tools and laid groundwork for a positive institutional change on the enforcement front, Cremers demonstrates how inspectors struggle to effectively enforce the regulatory framework applicable to posting due to limited territorial authority, the fragmentation of enforcement competencies among different actors and the still lacking cross-border cooperation among national authorities.

These challenges that institutions and actors in different national contexts have faced have not only driven institutional change at Member State level, but also have been a main driver behind the constant evolution of the regulatory framework of the posted workers regime at EU level. The Enforcement Directive, changes to EU social security rules (Chapter 8), changes in the course of CJEU's own case law and other "stepping stones" (Chapter 9)—inspired by the struggle in different national and local contexts, have ultimately led to the adoption of the Revision of the PWD in 2018, as the main source of regulation for the posted workers regime. It has been perceived as a (small) victory for posted workers from the Eastern periphery and workers and unions from the core. However, while it offers greater leeway to trade unions and national collective agreement systems to give posted workers greater protection, what the Revision process also exposed was how posting in the end is a question of not only national, but

13. VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).

14. 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'), 2014 O.J. (L 159) 11.

supranational political economy. The East-West division that emerged driven by the 'yellow card' attempt from the East,[15] was based on arguments that reduced the complexity of posting to a market rationality of supply and demand, where the lower price of labor from the East was considered a legitimate competitive advantage, disregarding the effects it has on democratic institutions of labor market governance.

Finally, as the book shows, posted workers themselves in their own way impact the posting system (Chapter 4 and 8). As Matyska's chapter (4) demonstrates, although posted workers find it difficult to navigate the complex institutional systems, and their agency is limited, they could also be considered an actor playing active role in the making of those systems through the everyday choices they are making. The complexity of the transnational legal regime seems to often compel posted workers to prioritise satisfactory employment arrangement over legality, which validates and further perpetuates the ambiguity of the posting model used by companies to undermine worker rights and protective structures. But in spite of the structural difficulties, the occasions on which posted workers reach out to a trade union or approach a state institution to bring attention to a particular problem on the ground, might eventually result in a change of rules or induce another kind of structural transformation.

In this light, the volume lives up to its own expectations to offer an example of how to further study European integration and national institutional change from below. However, at least two points of critique could be identified. First, it comes as a surprise that the Central and Eastern European Member States and the institutions of their political economies are absent from an enquiry seeking to explain European integration through institutional change from below. The fact that we see little about how the institutions and collective actors from the Eastern periphery navigate the posting regime prevents this study from making full use of its strong framework. Second, the interests of institutions and the actors explored in high-wage Member States at the core are often presented as universal. Even if that might be so, a problematisation of different interests from a core-periphery perspective[16] or even through a distributional analysis might call into question some of the assumptions or, if it confirmed them, make them more robust. This gap leads the volume to focus mostly on the integrative

15. The 'yellow card' procedure is part of the Early Warning Mechanism introduced with the Lisbon Treaty, enabling Member States' national parliaments to contest or block legislative proposals of the European Commission. See the discussion in Diane Fromage & Valentin Kreilinger, *'National Parliaments' Third Yellow Card and the Struggle Over the Revision of the Posted Workers Directive*,' 10 EUR. J. LEGAL STUD. 125 (2017).

16. See the discussion in Zane Rasnača, *'Identifying the (Dis)placement of '"New'" Member State Social Interests in the Posting of Workers: The Case of Latvia*,' 14 EUR. CONST. L. REV. 131 (2018).

and neglect the disintegrative potential of posting, which became evident in the East-West chasm during the Revision of the PWD.

In summary, in spite of these few weaker points, the novel conceptual framework of posted work as a driver of institutional change and the rich empirical material showing how this happens at national and EU level, both complement the existing literature. They present a valuable source for scholars across disciplines. Moreover, because it deconstructs simplifications and directly shows how posting in practice affects concrete actors, institutions and the political economy as a whole, the book is not only of interest to academic researchers—it could also be helpful to EU and national policy makers.