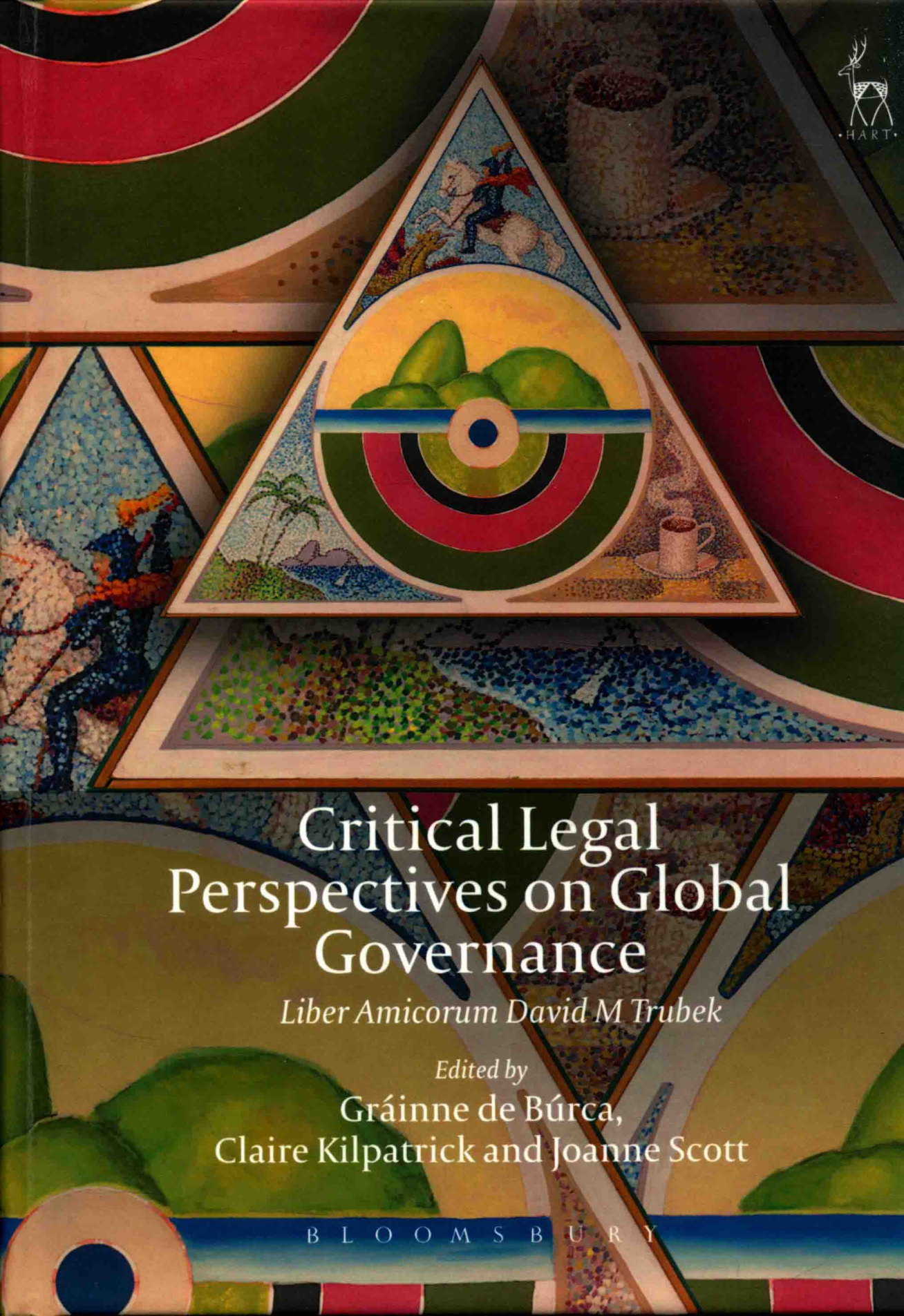

Critical Legal Perspectives on Global Governance

Liber Amicorum David M Trubek

Edited by

Gráinne de Búrca,
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CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE

This book of essays, written in honour of Professor David Trubek, explores many of the themes which he has himself written about, most notably the emergence of a global critical discourse on law and its application to global governance. As law becomes ever more implicated in global governance and as processes related to and driven by globalisation transform legal systems at all levels, it is important that critical traditions in law adapt to the changing legal order and *problématique*. The book brings together critical scholars from the EU, and North and South America to explore the forms of law that are emerging in the global governance context, the processes and legal roles that have developed, and the critical discourses that have been formed. By looking at critical appraisals of law at the global, regional and national level, the links among them, and the normative implications of critical discourses, the book aims to show the complexity of law in today's world and demonstrate the value of critical legal thought for our understanding of issues of contemporary governance and regulation. Scholars from many countries contribute critical studies of global and regional institutions, explore the governance of labour and development policy in depth, and discuss the changing role of lawyers in global regulatory space.

Editors' Preface

This volume is a Festschrift in honour of Professor David M Trubek, and the content of the volume reflects this fact. The research questions addressed in the various contributions are those that have animated his wide-ranging, diverse and highly-influential research. The three editors of this volume first came to know and to work with David Trubek in the framework of a series of projects on 'new governance' and labour law governance in the EU. And while his long-standing academic engagement with EU law and policy may seem a long way from his interests in the global legal profession and in law and development issues in Brazil, Duncan Kennedy highlights in his opening chapter how each of these distinct research interests is fundamentally animated by the objective of critically interogating law and institutions with a view to harnessing the transformative potential of law.

David Trubek has been a central figure in critical legal scholarship of the twentieth century and the new millennium. His work has developed an approach that combines critique of conventional legal discourse with a progressive agenda. One of its notable features has been to foster the migration and extension of critical discourse to the new legal spaces emerging and being created by processes of globalisation. The span of his enquiries has been global: from US-focused scholarship, to (what have become known as) the BRICS (Brazil, Russia, India, China and South Africa) and especially Brazil, and beyond the BRICS to the EU as well as to transnational and international institutions, networks and social movements. His perspective has been one of critical engagement: seeking to develop and extend critical inquiry with a view to promoting change and reform. His work has made major contributions to the development of Law and Society scholarship, especially the use of empirical work for progressive legal ends ('critical empiricism'), legal pluralism, the sociology of law and the legal profession; the Critical Legal Studies (CLS) movement; critical perspectives on law and development (most recently, Law and the New Developmental State); and New Governance. Not only has he helped develop these strands and bodies of scholarship, but he has looked for ways of integrating them to form a discourse that would combine critique and reconstruction in the best traditions of Pragmatism and American Legal Realism.

David Trubek's contribution can be seen not only in his writings but also in his significant organisational energy and achievements. Four recent examples illustrate this: the re-issue in 2011 of the edited volume resulting from the German-US critical legal scholars meeting in Germany organised by David with Christian Joerges in 1986; a special session of the Law and Society Association's (LSA) 2010 meeting to discuss his work on critical empiricism, reflecting his long-standing contributions to the LSA; the publication by the *Wisconsin Law Review* in 2010 of a special issue on New Governance and the Transformation of Law, reflecting the central role David and Louise Trubek have played at the University of Wisconsin, Madison, in building New Governance scholarship, especially its EU–US comparative dimension; and the creation of LANDS, the project on Law and the New Developmental State, which has undertaken studies in Brazil, Mexico, Colombia and Venezuela.

This book brings together scholars who have accompanied David on some part of these many academic adventures. A connecting theme of the book is an exploration of the emergence of a global critical discourse on law and its application to processes of global governance. As law becomes increasingly implicated in transnational governance, and as processes related to and driven by globalisation transform legal systems at all levels, critical traditions in law, if they are to remain relevant, need to adapt to the changing legal order and *problématique*. The contributors to this volume include critical scholars from the EU and from North and South America, and they present a variety of critical studies of global and regional institutions and governance practices, including in relation to the 'special case' of the EU. Amongst the themes examined are the transnational governance of labour and development policy, a critical assessment of the meaning and impact of rights discourses, and the changing role of lawyers in the global regulatory space.

There are three main critical approaches visible in David Trubek's work. One is CLS-inspired, one sociologically-inclined and one governance-oriented:

(i) the CLS-inspired approach seeks to unveil the politics and power implications of traditional legal rules, principles, institutions and thought (such as the rule of law, the ground rules of private and public law, the frameworks and goals of international institutions) in legal education and scholarship;
(ii) the sociological approach seeks amongst other things to examine the shaping of law and institutions through under-examined mechanisms such as social mobilisation, elite network elaboration and litigant analysis; and
(iii) the governance lens examines the limits of conventional legal tools in the face of the complexities of transnationalism and globalisation, and explores new normative mechanisms that seem to expand, adjust or challenge our understandings of law and democracy.

Each of these critical perspectives in Trubek's scholarship entails a rejection of an approach to legal scholarship which rotates 'around the abiding themes that law is vital, legal processes are neutral and rational, legal scholarship authoritative'.[1] Not only do they give different answers to the question 'what is law?' from the answer generally provided by traditional legal scholarship but, as the chapters in this volume demonstrate, they share a stronger interest than traditional legal scholarship in addressing the question: 'what is law for?'

The volume is divided into six main parts. The chapters included in the first section offer an introduction to David Trubek's scholarship and chart its evolution over time. These contributions carry out the work which is usually required of editors in that they tie together and analyse the interactions between different phases of David's academic journey and the different critical-left strands of his scholarship.

I. Critical Pathways in Law

The four chapters in this first part examine different aspects and phases of David Trubek's impressive corpus of academic scholarship, and reflect on their relationship to critique.

[1] DM Trubek and J Esser, 'Critical Empiricism and American CLS: Paradox, Program or Pandora's Box?' (2011) 12 *German Law Journal* 116, 119.

Duncan Kennedy's chapter contains a kind of condensed intellectual biography of David Trubek, focusing on his early intellectual influences and the path of his engagement with issues of globalisation from the time he worked for USAID and travelled to Brazil in 1964. Duncan Kennedy presents an engrossing account of the interweaving of the personal, political and intellectual dimensions of David Trubek's journey through the various stages of his academic career. In Duncan Kennedy's words, David has at every stage 'been producing subject-matter specific studies on the way globalisation, legal and economic, generates and perpetuates inequality' and arguing for reform and change to the neo-liberal paradigm of strong property rights for strong parties with no regulatory protection for weak ones.

Bill Simon looks in particular at one of the more recent phases of David's work, namely his engagement with 'new governance' in the EU, and asks whether there are continuities between this less overtly critical project and David's earlier explicitly critical bodies of work within the Law and Development, Law and Society, and Critical Legal Studies movements respectively. Bill Simon identifies and articulates four critical principles deriving from these three bodies of scholarship (anti-foundationalism, anti-determinism, anti-ideology and anti-separation-of-powers), and he then infers four practical criteria or conditions of presumptive political legitimacy (named after four of David's intellectual collaborators or inspirations: Jürgen Habermas, Duncan Kennedy, Roberto Unger and Charles Sabel) which any institution would have to meet to satisfy the four critical principles. He concludes that David Trubek's work on new governance and its potentially progressive role within EU law and politics potentially meets these four prescriptive conditions, and in that is animated by the same kind of integrated normative and critical impulse behind David's earlier work.

Ruth Buchanan's chapter looks at a different part of David's body of work, focusing this time on a particularly influential article he published with Mark Galanter in 1974 in the field of law and development, namely 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States'. This essay, which is also discussed in Duncan Kennedy's chapter, had presented a critique of the first wave of law and development scholarship and practice and the liberal-legal assumptions underpinning that project, based in part on the authors' own experiences. Ruth Buchanan's chapter seeks to document the legacy of this important essay in contemporary law and development scholarship, looking not only at its 'afterlife' in the writing of other scholars in the field, but also at its current relevance in alerting scholars to the occupational hazards of critical legal scholarship, including the difficulty of navigating the simultaneous pursuit of reform via fair and effective legal rules even while maintaining the critical stance of social scientists.

In the fourth and final chapter of this first part, Mario Schapiro and Diogo Coutinho, who are currently collaborators with David Trubek on their LANDS project, examine the evolving relationship between political economy and law in Brazil over the last half century. They outline three distinct phases or 'moments' during this time: a phase of development entailing interventionist economic law, a phase of moderate neo-liberalism and economic regulation, and the current phase of the 'new activism' of the state. They identify a number of challenges faced by economic law in this new state activism phase, including what they call the need for selectivity in the use of legal tools, instruments and legal forms, as well as the legitimacy and composition of institutional governance arrangements and particularly the need to develop reforms and new arrangements that are participatory, cost effective and politically responsive.

II. Transformations in Global Governance

In Part II, the chapters contributed by David Kennedy and Peer Zumbansen draw back from these more focused analysis of particular strands of the work and influence of David Trubek, and move instead to look at 'the big picture'.

Peer Zumbansen's chapter aims to connect domestic governance discourses with global governance and global constitutionalism discourses in the context of transnational regulation. He directs our attention to the ways in which information and knowledge (including the ubiquitous 'data-driven' approaches) have become key in development theory and practice today, and to the complexification and intensification of multiple discourses addressing the same set of issues. He points to the range of different new and established fields and sub-disciplinary approaches to the 'intersection between local fragmentation and foreign intervention', including global administrative law, third-world approaches to international law, and transitional justice, and notes how these and other approaches challenge and contest the basis of what counts as the relevant 'knowledge' underpinning policy, and how they carry different assumptions and 'semantic baggage' with them from the domestic to the international arena.

David Kennedy's chapter similarly steps back to survey the larger global landscape, this time with the aim of bringing questions of political economy—and specifically of global political economy—back within academic scrutiny. He identifies the key questions for today not as political questions about governmental or diplomatic action, or economic questions about how markets should operate, but rather questions about the distribution of growth. He argues that the key issue, highlighting the intertwining of political and economic projects, is 'how gains and losses are to be distributed between those who lead and those who lag', and yet notes how little international legal scholarship addresses the global distribution of political authority and economic growth. Internationally-minded lawyers, he suggests, need to reframe and interpret the role of law 'as the cloak hiding asymmetric dynamics of power in political economy of the world' which creates and links centres and peripheries across the global stage. He points out that since law regulates the elements of both political and economic life, the task for critical and reform-minded legal scholars is to imagine the building of a new political economy for a global society.

III. Labour and Globalisation

The five chapters in this part identify different challenges and perspectives on globalisation in relationship to labour standards. All draw on Trubek's scholarship in this area. Perhaps the most prominent preoccupation concerns new spaces and dilemmas for labour standards in a globalised trading system. This includes at least two key issues. One is the effect of global trade on labour standards. If such trade drives down labour standards in advanced economies, as both Compa and Stone assert in their analyses, how can the economic benefits of free trade for developing countries be maintained while combatting this race to the bottom? This dilemma creates tensions between developed and developing economies both globally and within distinctive regimes such as the EU where internal market rules

combined with EU enlargement have created east–west dilemmas on labour standards. A second is whether there is an incipient transnational labour regime. Components of such a regime include labour conditionality in trade agreements signed by the US and the EU with third countries, new developments in international labour sources, adaptation of national regimes to meet the challenges of more open regional trading arrangements (such as the EU or NAFTA), and some signs of cross-border worker mobilisation within these new transnational legal spaces.

A second set of pressures on labour regimes and standards, especially their national realisation, comes from the need to adapt to changed social, (macro-)economic and technological as well as political environments. The shift from manufacturing and mass production in labour systems organised around standard employment relationships has, for instance, placed old worker solidarities under very significant pressure, with unions and job security viewed as relics of the past. More sharply, responses to the 2008 financial crisis have highlighted how dismantling labour law can become a default policy response to issues and problems largely unrelated to labour standards. This has led to reflection on how to develop new forms of identity and resistance between those who engage in paid work and other groups and actors, within and beyond the state.

Related to both these profound shifts, and another hallmark of Trubek's scholarly contributions, is attention to how new labour regimes change the nature of law in regulating labour with variants of hard, soft and hybrid legal frameworks becoming more prominent and requiring both careful empirical assessment and critical evaluation.

Harry Arthurs uses the evocative metaphor of 'making bricks without straw' to reflect on the profound difficulties of building a transnational labour regime. He makes the important point that, for reasons linked to both global trade and social-economic-technological shifts, national governments, the linchpin of the post-war welfare consensus, have ceased either to believe in progressive labour policies or to implement them. The crucial missing ingredient in the construction of new labour regimes, nationally and transnationally, is collective worker-identification with that status which has ceased for many to be a central source of common identity. What then of transnational labour regimes 'after labour'? He suggests a reorientation towards all those affected by economic insecurity and subordination to constitute new communities of collective action and resistance to claim standards of decent economic relations.

Lance Compa carefully traces the changing nature and sources used in US labour conditionality in its trade agreements both preceding and post-dating the NAFTA labour side agreement. The rationale is to take labour standards out of competition. He looks at mobilisation within the US political process to obtain such conditionality, the intense battles over the wording concerning labour conditionality, and the law and practice surrounding their compliance mechanisms. In particular, he charts the growing use of the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Despite the problems with these US trade-labour agreements, he suggests that their existence has produced some benefits. It has put the relationship between trade and labour on the global institutional policy agenda, promoted reflective scholarship, and created spaces for transnational mobilisation and collaboration involving lawyers, unions and other activists.

For Katherine Stone the core dilemma is that with global trade, 'labour standards tend to flow to the lowest point'. Because of corporate capacity to deterritorialise, gains from free trade do not necessarily accrue to those living in the territory where the traded goods and services were produced. Under certain conditions, corporate flight to low-labour

standard locations as well as regulatory competition by states to attract foreign business, drives down labour standards. Stone identifies and assesses three broad strategies to prevent labour 'drowning in globalisation': using new modes of governance to incite races to the top through processes of peer review; taking advantage of the tendency of some firms to cluster in locations with certain endowments by developing locally-based organising initiatives in those locations; and reconfiguring labour regimes in advanced economies so as to combine firms' needs for flexible innovation-oriented human resources with workers' needs for life security.

Focusing primarily on the post-2008 economic crisis, Kerry Rittich argues for an expanded law of work to take into account a broader set of policy interventions impacting on work as well as a wider range of work relationships, including the borderline between the formal and informal economy. Looking at fiscal and monetary policy, as well as EU bail-out conditionality and crisis deals to save the North American car industry, she illustrates narratives driving the policy response such as the 'belief that labour standards and collective bargaining are per se sub-optimal' which show why critical methods help assess how labour law has come to be central to the resolution of what is essentially a financial and debt crisis.

Concluding this rich section of the volume, Alvaro Santos re-opens three arguments often used to defend the labour law status quo: that it reflects national or regional (EU) identity; that it is inherently progressive; and that the constitutionalisation of social rights enhances their protection. Using the examples of Mexico and recent EU developments, he argues that these assertions are not only unwarranted, they are undesirable. Like Rittich, Santos urges instead analysis of the distributive effects of labour law regimes on wealth and power. Where such analysis reveals undesirable consequences of the status quo in relation to issues such as gender or generational equity, or workers' autonomy and subjectivity, that status quo should be open to progressive critique and re-imaginings. Such distributive analysis also forecloses the view that embedding social rights as fundamental will, in and of itself, prevent regressive social policies.

IV. The European Union

The fourth part in this volume is focused on EU law and governance and explores the potential and possible limitations of a new governance approach. This part opens with a contribution by Kenneth Armstrong, which explores the multiple encounters between (new) governance and law. Like Bill Simon and Duncan Kennedy earlier in the volume, Armstrong argues that new governance has the potential to advance the cause of a progressive law and politics, not least because of the way in which the new governance framing has opened up new areas (including, prominently, anti-poverty policy in Armstrong's own work) for critical engagement in EU law. Contrary to the later chapter by Christian Joerges and Maria Weimer, Armstrong concludes that the current crisis in Europe is as much a crisis *for* law, and a crisis *of* law, as it is a crisis in governance. The economic crisis has created momentum in favour of 'muscular', 'harder rules and sanctions' and has brought in its wake the threat of 'hyper-legalism' rather than a dangerous absence of law. Contrary to received wisdom, Armstrong argues that '[t]he challenge facing Europe is not so much the alleged delegalisation of new governance' but 'a corrosive legal instrumentalism'.

Norbert Reich uses David Trubek's writings on European consumer law, labour law and new governance as an entry point into recent discussion and debate concerning the construction of a European contract law. Reich explores the different phases of European contract law and the different instruments that the EU has deployed. When minimum harmonisation created a new kind of regulatory gap, the EU experimented with different strategies including conflicts-of-law regulation, full harmonisation and a new governance-Open Method of Coordination (OMC) type approach. Reich is critical of the European Commission's current proposal for a regulation on a Common European Sales Law, arguing that it does not satisfy the 'necessity test'. Reich looks to new governance in general, and to David Trubek's contribution to new governance scholarship in particular, for inspiration regarding a possible alternative approach, one which is predicated upon reflexive contract governance with a recommendation rather than a regulation at its core.

Christian Joerges and Maria Weimer offer a less optimistic account of new governance, casting doubt on its accomplishments and suggesting a need for new governance to go back to its critical roots. They argue that the weaknesses of new governance are reflected in current economic governance in the context of the ongoing crisis, and that recourse to 'hybridity' involving both hard and soft law has been not only economically unsuccessful but also socially disastrous. In this setting, new governance is presented as nothing short of a threat to democracy and to the rule of law. Joerges and Weimer begin to set forth an alternative approach which they frame as 'conflicts-law consitutionalism'; an approach that is intended to ensure that 'the idea of law-mediated legitimacy can be preserved, and that the integration project can regain its democratic credentials'. The goal of conflicts-law constitutionalism is to ensure that conflicts between the EU and the Member States are resolved through rules and principles that are acceptable to all, rather than through hierarchy or executive managerialism. The means that conflicts-law constitutionalism deploys is the proceduralisation of EU law.

V. Rights Discourse

Three chapters focus on the deployment of human rights discourse in a range of locations and issues. All set rights, civil and social, in a broader framing so as to provide a rich context for a range of critical approaches.

Henry Steiner's chapter sets the headscarf controversy in France and a number of other European countries in a broader critical and global perspective. Looking at how countries of immigration manage newcomers he contrasts state assimilation policies with policies embracing plural identities. Through careful analysis of relevant French legislation, he makes clear the incoherence of that legislation with its stated goal of protecting *laïcité* (secularity). He also subjects the human rights supervision of the European Court of Human Rights on this issue to searching scrutiny, arguing that, with one recent exception, its jurisprudence is marked by lack of rigour, failure to engage fundamental questions, and leaving too large a margin of appreciation to states such as France, Switzerland and Turkey.

Tamara Hervey's chapter focuses on how to protect social rights before courts in litigation framed by the EU's internal market freedoms. She imagines what EU law could be like if, in its reasoning and its presuppositions, it took social rights seriously by rethinking and

rewriting, in an exercise of 're-imagined jurisprudence' a central internal market judgement on health care. In so doing, by foregrounding the collective dimensions of health care, and their allocation on the basis of national or sub-national democratic processes, she makes explicit both the non-inevitability of the Court's current jurisprudence and the opportunity to re-orient it towards greater constitutional symmetry between the supranational and the national, and between market liberalisation and other values worthy of protection.

A different critical approach to social rights and their relationship with the market is provided by Helena Alviar García who asks whether social, economic and cultural rights limit or reinforce the market. Although the Colombian Constitutional Court has been lauded for its emancipatory, market-limiting judgments building on a 1991 Constitution rich in socio-economic provisions, she argues that broader distributive analysis, with greater attention to institutions and policy-shaping, reveals the constitutional rights jurisprudence to largely protect those already in the market for housing and health, hence complementing rather than challenging market-oriented reforms.

VI. The Legal Profession and Globalisation

The sixth and final part of this volume is centred on the study of legal professions and global governance. The first contribution, by Yves Dezalay and Bryant Garth, explores Bourdieu's *Sur l'Etat*, lectures delivered at the College de France in which he returns to ideas first set out in *The Force of Law*. Although rooted in continental European history, Dezalay and Garth argue that these lectures have much to contribute to a law and society understanding of the US Cravath model of lawyering. More generally, they argue that law and society scholarship is set within the paradigm of legal realism and that it tends to be characterised by an almost complete absence of the kind of reflexive sociology that they consider to be indispensable to understanding the constitution of the legal field. While legal scholars purport to increasingly draw upon the writings of Bourdieu, the reflexivity that is central to Bourdieu's research remains neglected all the same. Law and Society scholarship rests upon the 'structural invisibility of hierarchical structures in the field of legal power', with empiricism and cause lawyering both exhibiting the same blindness when it comes to analysing the 'the structures of the field of legal power'.

Mihaela Papa turns her attention to emerging powers, specifically the BRICS, and analyses whether these countries have served, or may be expected to serve, as what she calls agents of social change. Papa offers a conceptualisation of the politics of reforming global governance as involving the interplay between three factors: the existence of a reformist coalition, the context of reform, and the incentive for reform. She then goes on to explore the reformist agenda of the BRICS in the crucial and contested area of investment arbitration, an area in which emerging economies are as concerned to ensure the effective protection of their own investors as they are to promote the fairness of the regime. Papa finds that in the area of investment arbitration, the 'BRICS are unlikely to exert joint leadership as a change-seeking coalition', with the different countries exhibiting different policies and different levels of engagement with global investment governance. Different members of the group are even engaging in investment disputes between themselves. Nonetheless, Papa posits that the relationship between China and Brazil is key in determining how much future cooperation may be achieved.

John Ohnesorge's contribution brings together different themes that have long been present in David Trubek's work, including law and development, the legal profession and global governance. He considers whether it might be appropriate for national governments to offer protection or other kinds of support for business lawyers, treating them as akin to 'infant industries'. Relying principally upon the writings of Jacob Viner, and breaking down the market for corporate legal services into distinct segments, Ohnesorge highlights a number of concerns. While he considers that an infant industry approach facilitates an unusually rigorous analysis of the issues, Ohnesorge reaches the provisional conclusion that it is not at all clear that the provision of infant industry support for local law firms providing internationally-related legal services would constitute 'good public policy', not least because of the consequences of protectionism for the quality and costs of the services concerned. Ohnesorge's analysis is wide-ranging, covering domestic litigation and domestic regulatory work in the protected market, out-going work for business clients from the protected market, and capacity building outside and within government for participation in international governance, including in the settlement of international disputes.

The volume concludes with a chapter by David Wilkins who points to David Trubek's 'uncanny ability to find where the action is'. The main focus of the chapter is on Wilkins' and Trubek's current collaboration on GLEE (Globalization, Lawyers and Emerging Economies). GLEE examines the question of why the legal profession (and specifically the corporate legal sector) is changing so rapidly in countries such as Brazil, India and China and considers what implications this might have for economic development and for the rule of law. This is both a socio-legal and a critical-legal project and in the words of Duncan Kennedy it is one of the projects that currently takes David Trubek 'back to Brazil'.

This has been an especially easy and wonderful project to work on. We have had none of the usual editorial problems of persuading leading scholars to attend the workshop at the European University Institute in Florence in June 2012 or to contribute chapters in a timely fashion to this volume. In fact, such was the general enthusiasm for the project that a number of people who did not write chapters for this volume nonetheless participated in different ways in the Florence event. We would like to thank Dirk Hartog and Catherine Meschievitz for their interventions and insights during the event. We are particularly grateful to Professor Louise Trubek for her assistance from the beginning to the end of this project. Her support has been invaluable. Thanks are also due to those who contributed financially to the running of the workshop in Florence, namely the Academy of European Law, and the Law Department and the Schuman Centre at the European University Institute (EUI), and New York University Law School.

We owe a very large thank you to Eleonora Masella from the EUI Law Department for making all the arrangements required for the conference held at the EUI in June 2012. Despite the heat and the formidable logistics, she remained calm, competent and good-humoured throughout. Vesselin Paskalev, a PhD researcher at the EUI, has helped enormously in getting the volume ready for publication and we are very grateful for his help.

Finally, we are grateful to David Trubek for his role, together with Louise Trubek, in inspiring each of us in our individual and collective academic projects, in bringing together and prompting new critical and progressive research projects, and in enriching our global, comparative and transatlantic scholarly endeavours with his energy, intellect and friendship.

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