

ECONOMIC INTEGRATION AND TRANSNATIONAL LABOUR REGULATION: A REVIEW ESSAY

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Globalization has triggered a renewed interest in the transnational dimension of labour law. This review essay considers four books recently published in the United Kingdom that examine either international labour law or European employment law. These books demonstrate the importance of transcending legal formalism and the need to delve into economics, history, sociology, and politics in order to understand the functions and impacts of labour law in the globalized world of the twenty-first century.

La mondialisation a eu pour effet de renouveler l'intérêt porté à la dimension transnationale du droit du travail. Cet essai critique porte sur quatre livres publiés récemment au Royaume-Uni qui examinent soit le droit international du travail ou le droit du travail en Europe. Ces livres montrent l'importance de surpasser le formalisme juridique et le besoin de fouiller dans les domaines de l'économie, de l'histoire, de la sociologie et de la politique afin de comprendre les fonctions et les répercussions du droit du travail en ce ^{xxi}^e siècle où règne la mondialisation.

1. Introduction

A recent spate of books published in the United Kingdom (UK) indicates a renewed interest in labour law, especially in its transnational dimension.¹ The impetus behind it is greater economic integration across national borders. Globalization, or more accurately, the fact that nation states lack either the capacity or the will to engage in labour law reform

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¹ Recent examples include, J. Conaghan, R. M. Fischl and K. Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002); P. Alston, ed., *Labour Rights as Human Rights* (Oxford:

or introduce new forms of labour regulation in the face of mobile capital, digital technologies, and the power of transnational corporations, has shifted the focus of labour law academics and increasingly labour lawyers from the national to the supranational level. In Canada and the United States, for example, despite some changes around the edges, the core of employment and labour law “has largely stood still over the past fifteen years.”² By contrast, in the UK, in less than a decade the fundaments of labour law have been transformed, driven in part by the Blair government’s embrace of the European Union (EU) and the European “social model.”³ In Canada and the United States (US), transnational labour law is largely aspirational, providing a source of norms for labour advocates and a set of institutions that provide a space for developing transnational solidarity between unions and non-governmental organizations and for directing public scrutiny.⁴ In the UK, European Union employment law, whether in the hard form of directives or in the soft form of guidelines and bench-marks, has transformed the terrain of labour law from one of legal abstention and collective *laissez-faire* to one crowded with a plethora of statutory individual employment rights and one lone initiative providing for collective labour rights.⁵

The books discussed in this essay focus either on globalization and labour law broadly understood, or more specifically on employment law in the EU. They were selected because they: were published between 2004 and 2006; use different formats (two are collections, while two are single-authored texts); and target different audiences (two are aimed at the non-specialist who wants to understand the broad area of globalization and labour law, and two are for specialists who seek to

Oxford U.P., 2005); V. A. Leary and D. Warner, eds., *Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Leiden: Martinus Nijhoff, 2006).

² J. D. R. Craig and S. M. Lynk, eds., *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) at 2. The general claim that Craig and Lynk make, that “domestic” labour laws have stood still, is incorrect, as the examples of the UK and Australia indicate. This illustrates two general problems with the introduction to this volume: the failure to provide references for the claims made; and the tendency to view what is happening to labour law throughout the world through the narrow lens of what is happening in Canada and the US.

³ S. Deakin and G. S. Morris, *Labour Law*, 4th ed. (Oxford and Portland: Hart Publishing, 2005) at 42-47. In 2006, the Australian labour law regime was fundamentally transformed from a system of industrial awards at the sectoral level to one that emphasizes individual contracting, see J. Fudge, “Precarious Employment in Australia and Canada: The Road to Labour Law Reform” (2006) 19 Aust. J. of Lab. L. 1 at 15-16.

⁴ L. Compa, “Labour Rights in the FTAA,” in Craig and Lynk, *supra* note 2 at 245-273.

⁵ Deakin and Morris, *supra* note 3.

deepen their understanding of European employment law).⁶ The following discussion starts with the most recent book, and the goal is not only to identify the strengths and weaknesses of each, but also to contrast one against the other in order to highlight differences and complementarities in methodologies, themes, and scholarship.

Diego Rivera's remarkable mural depicting Detroit industry at the beginning of the Roosevelt New Deal graces the cover of *Globalization and the Future of Labour Law*, edited by John D. Craig and S. Michael Lynk. Although it makes a beautiful cover, it is not obvious whether or not it is meant to be ironic. Rivera, the famous Mexican muralist who supported and befriended Trotsky, was commissioned by Edsel Ford to portray the glory of American industrialism on the walls of the Detroit Institute of Fine Art. The mural is the emblematic depiction of Fordism, which has come to symbolize the standard employment relationship, the male bread-winner employment model, the large vertically-integrated firm, internal labour markets based on narrowly defined jobs, and large-scale mass-production industries.⁷ But the Fordist model, upon which labour law was based in developed liberal countries, has been rendered increasingly outmoded in the new economy.⁸ It is the lack of fit between the Fordist model of labour law and new forms of work arrangements as much as globalization that has contributed to the crisis in national labour.⁹ Yet only two of the essays in the collection¹⁰ focus specifically on employment that falls outside the Fordist norm, although a couple touch upon the informal sector.¹¹ This focus gives the impression that it

⁶ The books under review are Craig and Lynk, *supra* note 2; B. Hepple, *Labour Laws and Global Trade* (Oxford and Portland: Hart Publishing, 2005); D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford: Oxford University Press, 2005) [*European Employment Strategy*]; and S. Sciarra, P. Davies, and M. Freedland, eds., *Employment Policy and the Regulation of Part-time Work in the European Union: A Comparative Analysis* (Cambridge: Cambridge University Press, 2004).

⁷ M. Aglietta, *A Theory of Capitalist Regulation: The US Experience* (London: New Left Books, 1979); A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

⁸ J. Fudge and R. Owens, eds., *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford and Portland: Hart Publishing, 2006).

⁹ J. Fudge, "Feminization and Fragmentation: The Challenge of Equity for Labour Market Policy," in J. Brodie, ed., *Women and Public Policy in Canada* (Toronto: HBJ, 1995) at 57-87.

¹⁰ M. Cornish, F. Faraday, and V. Verma, "Securing Gender Justice: The Challenges Facing International Labour Law" in Craig and Lynk, *supra* note 2, at 377-408; and R. Cholewinski, "International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization" in Craig and Lynk, *ibid.* at 409-44.

¹¹ See A. Bronstein, "Trends and Challenges of Labour Law in Central Europe" in

is only global competition, and not a range of other related factors, that has led to the crisis in national labour law.

The collection comprises a short introduction and fifteen chapters written by lawyers, officials of supranational organizations and national governments, and professional academics. It is broken into six parts, three of which deal with general themes such as perspectives on globalization, international labour standards, and labour rights, and these frame the chapters focusing on the European Union, the Americas, and the International Labour Organization (ILO). The different social locations of the contributors help to explain the mixed tone and depth of their contributions. The chapters by the lawyers, for example those by Brian Burkett,¹² and Mary Cornish, Fay Faraday, and Veena Verma,¹³ provide respectively introductory overviews of the international dimension of labour law and of international labour rights for women workers, and contain useful catalogues of the institutions, instruments, and norms that are available. But these chapters are almost completely disengaged from the academic literature, with the result that there is no basis upon which the reader can evaluate the impact or effectiveness of the international dimension¹⁴ or gain an awareness of the broader debate on the feminization of employment and the norms of labour law.¹⁵ Edward Potter's discussion¹⁶ of how US trade and investment policies have enhanced the importance of the ILO shows little awareness of the fact that the close association of the US with the ILO's core labour rights strategy has led some commentators to question the legitimacy of the ILO's approach.¹⁷ With the exception of the debate over the relationship between globalization and the regulatory race to the bottom, which is a

Craig and Lynk, *ibid.* at 191-224; B. Langille, "Globalization and the Just Society – Core Labour Rights, The FTAA, and Development" in Craig and Lynk, *ibid.* at 274-303; and W. Sengenberger, "International Labour Standards in the Globalized Economy: Obstacles and Opportunities for Achieving Progress" in Craig and Lynk, *ibid.* at 331-54.

¹² "The International Labour Dimension: An Introduction" in Craig and Lynk, *ibid.* at 15-50.

¹³ *Supra* note 10.

¹⁴ Burkett's chapter provides a description of a broad range of transnational legal regimes (the International Labour Organization (ILO), the EU, the North American Free Trade Agreement (NAFTA), Mercosur, and the Summit of the Americas), concentrating on their formal features.

¹⁵ There is a rich debate concerning the feminization of labour that was kicked off by Guy Standing; see his "Global Feminization through Flexible Labour" (1989) 17 *World Development* 1077-97; and "Global Feminization through Flexible Labour: A Theme Revisited," (1999) 27 *World Development* 583-602.

¹⁶ "The Growing Importance of the International Labour Organization: The View from the United States" in Craig and Lynk, *supra* note 2 at 356-76.

¹⁷ See e.g. G. Mundlack, "The Transformative Weakness of Core Labour Rights in Changing Welfare Regimes" in E. Benvenisti and G. Norle, eds., *The Welfare State*,

central concern in the articles by Kevin Banks,¹⁸ Alan Hyde,¹⁹ Brian Langille,²⁰ and Werner Sengenberger,²¹ there is little engagement with some of the key issues in the broader international labour law literature, such as, for example, the appropriate form that regulation should take. Véronique Marleau provides an interesting and informative discussion of the meaning of the controversial term “globalization”²² in the context of her analysis of the reasons to favour the principle of subsidiarity to determine at which level of governance labour law should be developed and administered, but key concepts, such as informality, are either not defined or used differently in different chapters.²³

Despite the fact that several articles discuss the same theme or issue, no debate or integration is provided either in the introduction or in the specific chapters. Hyde’s thoughtful and provocative discussion of the problem of collective action known as stag hunts (which differs from the classic prisoner’s dilemma in that co-operation is always rational, but only if everyone else co-operates)²⁴ is not taken up in any of the other articles that discuss the problem of social dumping. Several articles go over the same empirical studies on the question of the regulatory race to the bottom, but they do not engage with each other and the editors do not point out the commonalities or divergences. Moreover, some of the authors have not been pushed to develop their views. Harry Arthurs’

Globalization, and International Law (Berlin: Springer, 2004) at 231; and P. Alston, “Core Labour Standards and the Transformation of the International Labour Rights Regime” in Leary and Warner, *supra* note 1.

¹⁸ “The Impact of Globalization on Labour Standards” in Craig and Lynk, *supra* note 2 at 77-107.

¹⁹ “A Game-Theory Account and Defence of Transnational Labour Standards – A Preliminary Look at the Problem” in Craig and Lynk, *ibid.* at 143-69.

²⁰ *Supra* note 11.

²¹ *Ibid.*

²² V. Marleau, “Globalization, Decentralization, and the Role of Subsidiarity in the Labour Setting,” in Craig and Lynk, *ibid.* at 108-42.

²³ Neither Langille, *supra* note 11, nor J. Pastore (“The Future of Labour Integration: The South American Perspective” in Craig and Lynk, *ibid.* at 304-30), who discuss employment in the informal economy, define what they mean by this term. Cornish, Faraday and Verma, *supra* note 10 at 380-81, do not define the informal economy, but refer to forms of employment such as “self-employment, part-time employment, casual and temporary employment and home-based low income work” as part of the informal economy. In the Canadian context, however, (and in most developed industrial economies) part-time work would rarely be categorized as part of the informal economy. Sengenberger, *supra* note 11 at 341-42, discusses informal employment and informal enterprises. While it is true that the “informal economy” is notoriously difficult to define, it would have been useful if either the editors or the authors who use it had provided some discussion of the meaning of the term.

²⁴ Hyde, *supra* note 19 at 143-66, 149.

chapter raises important ideas, arguing, for instance, that globalization is formative and not normative, and that justiciable bills of rights serve a legitimacy function when democratically accountable governments are constrained from introducing social legislation by supranational economic agreements; he fails, however, to develop these insights in his contribution.²⁵

Langille's contribution on the now-stalled process of the Free Trade Agreement of the Americas (FTAA) argues that free trade is good for people and that it is perfectly compatible with a core labour rights strategy. He defends core labour rights, which he characterizes as market enabling, and he quotes Sengenberger for the proposition that higher labour standards in the formal economy do not lead to informalization.²⁶ Langille goes on, however, to make the claim that "inefficient substantive labour law" — not core labour rights in the form of freedom of association and collective bargaining — is responsible for the "attractiveness of the [informal] sector."²⁷ On the other hand, Sengenberger, in his chapter, defends international labour standards (the ILS), which include substantive and not just core rights, as paying economic, social, and political dividends.²⁸ While it is informative to see such a profound disagreement between a current consultant to the ILO (Langille) and a former highly-placed ILO official (Sengenberger), it is a shame that neither editors nor authors remark on, or explore, this difference of opinion.

Manfred Weiss²⁹ and Arturo Bronstein³⁰ provide interesting discussions of the challenge posed to European employment law by the recent round of community enlargement in which countries of Central and Eastern Europe, with much lower labour standards than the existing members of the union, have joined the European Union. Similarly, Lance

²⁵ H. Arthurs, "Who's Afraid of Globalization? Reflections on the Future of Labour Law" in Craig and Lynk, *supra* note 2 at 51-76. In part this may be because, as the editors note in their introduction, the chapter was initially produced as a lecture for a conference and Arthurs has developed these insights in other articles.

²⁶ Langille, *supra* note 11 at 295-96.

²⁷ *Ibid.* at 296. Although Langille actually refers to the formal sector, this must be a typo since this assertion runs contrary to his entire argument. It is also interesting to note that Sengenberger claims that the "ILS [which includes labour standards] cannot be the root of explanation of informal employment because informalization has also occurred and spread (and is actually most pervasive) where employment protection legislation is limited or non-existent." See Sengenberger, *supra* note 11 at 343.

²⁸ Sengenberger, *ibid.* at 337-39.

²⁹ "Industrial Relations and EU Enlargement" in Craig and Lynk, *supra* note 2 at 169-90.

³⁰ *Supra* note 11.

Compa³¹ and José Pastore³² offer their thoughts on the FTAA, and despite their differing geographic locations — Compa is from the North (the US) and Pastore from the South (Brazil) — both endorse use of the North American Accord on Labour Cooperation (NAALC), which is based on the effective enforcement of national law, as a model for the FTAA. Although Compa recognizes the limitations of the NAALC and would draw upon other initiatives in the Americas to supplement it, he advocates effective enforcement of national labour laws, so long as they comport with fundamental rights, as the core labour obligations of the FTAA.³³

Catherine Barnard³⁴ and Ryszard Cholewinski³⁵ examine the controversial issue of labour mobility in the context of closer economic integration across national borders. Barnard focuses on how the concept of solidarity as articulated by the European Court of Justice has been stretched by the recent accession of the countries of Central and Eastern Europe. She shows how the Court's decisions have developed a conception of citizenship for non-workers that depends upon the host country's decision either to grant residence to or, at the very least, not to remove those who are not legally migrant. Cholewinski takes a broader view, and his chapter shows how the protection of migrant workers "raises profound challenges for the role and efficacy of labour law in the era of globalization."³⁶ He demonstrates that even prosperous countries such as Canada fail to protect "temporary workers, and specifically agricultural workers employed under agreements with Caribbean countries and Mexico, who are required to work long hours and [face] pressures exerted on them by employers not to complain in the event of abuse."³⁷

In sum, this collection is a mixed bag. There are some gems, such as Hyde's discussion of another economic model that can be used to justify transnational labour standards, Barnard's and Cholewinski's discussion of the challenges that national sovereignty poses to a global labour

³¹ *Supra* note 4.

³² *Supra* note 16.

³³ Compa, *supra* note 4, argues that it is better to build upon what exists rather than to start over with a new model, and he is very critical of the EU and the European Court of Justice, especially the decisions of the latter on affirmative action programs. He devotes little attention, however, to the shortcomings of the labour rights regimes already in existence in the Americas, preferring instead to "glean positive elements."

³⁴ "Labour Market Integration: Lessons from the European Union" in Craig and Lynk, *supra* note 2 at 225-44.

³⁵ *Supra* note 10.

³⁶ *Ibid.* at 409.

³⁷ *Ibid.* at 426.

market, Marleau's discussion of the dysfunctional decentralization of Canadian collective bargaining, and Banks' point that the failure to enforce standards is a form of deregulation. However, many of the articles, as well as the introduction, simply leave the reader hungry for a more substantial and nuanced discussion of key concepts and debates.

Bob Hepple's *Labour Laws and Global Trade* will benefit both readers who are new to the international dimension of labour law and those who are well versed in the area. It is erudite, drawing on insights from fields other than philosophy and economics, such as history, politics, and international relations, and it provides a systematic and comprehensive survey of a broad range of different kinds of transnational labour law. The discussion alludes to the ILO, corporate codes, unilateral social clauses, bilateral and regional labour regimes, the link between international economic institutions and labour rights, legal actions in national courts and tribunals that target transnational corporations, and negative and positive harmonization in the EU, including new regulatory devices such as the Open Method of Coordination (OMC). This succinct and nicely-structured book - the use of boxes to define terminology and summarize key elements of the different legal regimes works extremely well - manages to describe a wide range of transnational labour law regimes and engage with the specialized literature a manner that is neither simplistic nor didactic. Hepple demonstrates that it is possible to describe complex transnational labour regimes clearly, while remaining attentive to the nuances of the rich academic debates.

The introduction provides Hepple's core argument and identifies the key dilemmas facing labour laws in an era of globalization. He argues "that the reconciliation of global trade and labour rights will not come from relocating labour law within the sphere of international trade law," but instead, "efforts should be directed at shaping many new strands of transnational labour regulation that are emerging so as to spread the benefits of growing trade and investment to the poorest, to protect human rights, and to contribute to social justice and democracy."³⁸ The key dilemmas he identifies are the different perspectives and interests of developed and developing countries and the apparent contradiction between economic efficiency and social justice. Throughout the book, Hepple is scrupulous in his commitment to examine the issue from developed and developing countries, and the deep linkages between the economic and the social.

³⁸ Hepple, *supra* note 6 at 3.

Hepple notes “the ghost of David Ricardo’s theory of comparative advantage continues to haunt debates about free trade and transnational labour regulation.”³⁹ This spectre has informed the “orthodoxy of much of the literature on ‘new’ labour law,” which laments the inability of nation states in an era of nimble transnational corporations to regulate national labour markets, with the resulting race to the bottom.⁴⁰ As a counter to this orthodoxy, Hepple develops the idea of comparative institutional advantage, which he uses to explain why globalization has not resulted in the widespread deregulation of labour markets.⁴¹ This theory, which draws upon the work of Hall and Soskice regarding varieties of capitalism,⁴² acknowledges that globalization places nation states under increased pressure to be competitive while simultaneously recognizing that each country’s regulatory regime is an amalgam of social institutions, norms, and actors. The theory of comparative institutional advantage is used to explain the institutional diversity of national labour law regimes. Hepple argues that this diversity should be allowed to flourish so long as there is a strong floor of minimum fundamental rights recognized at the international level. He is a compelling advocate of a rights-based approach to labour regulation, and he believes that the future of global labour law lies in “strengthening the many strands that are emerging of a new global labour law,”⁴³ which include developing regional agreements as the EU has, cultivating the culture of social responsibility with transnational corporations, and empowering local actors such as trade unions and non-governmental organizations.⁴⁴ He also makes some modest recommendations for reforming the ILO.

But, as Hepple acknowledges, while economic models set out the parameters of comparative institutional advantage, it is political choices that determine the outcomes.⁴⁵ Labour law results from struggle, which has to do with power, and it involves contestation between social groups over different ideologies.⁴⁶ Hepple makes this point most vividly in his preface, where he identifies the beginning of his “intense interest in international and comparative labour law” in the 1950s, when he drafted

³⁹ *Ibid.* at 23.

⁴⁰ *Ibid.* at 251. Hepple does not address the fact that deregulation also includes the failure to enforce labour legislation.

⁴¹ *Ibid.* at 252.

⁴² P.A. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

⁴³ Hepple, *supra* note 6 at 271.

⁴⁴ Empowering local actors should, in theory, create pressure on governments to enforce labour legislation.

⁴⁵ Hepple, *supra* note 6 at 256.

⁴⁶ *Ibid.* at 257.

petitions to credential committees of successive International Labour Conferences challenging the South African government's exclusive choice of workers' delegates from the all-white racist unions. He notes that to his astonishment, the ILO, whose Constitution and Conventions oppose all forms of discrimination, repeatedly rejected his petitions. Ultimately, international pressure (power and not norms) forced the apartheid regime to withdraw from the ILO.⁴⁷

Diamond Ashiagbor's beautifully-written and finely-structured book, *The European Employment Strategy: Labour Market Regulation and New Governance*, should be read by specialists who are interested in European employment law and generalists who are concerned about the economics of labour markets and the emergence of new forms of governance. This book, the winner of the 2006 Peter Birks Prize for Outstanding Legal Scholarship, uses the EU's employment strategy to illustrate how economic policy has displaced social policy at the same time that hard law and the use of regulation has given way to soft law and governance by way of guidelines. It is a wonderful example both of the fruitfulness of an interdisciplinary socio-legal approach to studying forms of regulation and the importance of engaging at a deep level with the literature of other disciplines.

Ashiagbor's method is to provide a detailed policy analysis of the European Employment Strategy (EES) combined with an interpretive study of the ideological context in which such policy is developed. She examines three policy discourses — economic, social, and employment — in Europe since the early 1990s. Her focus is threefold: 1) the economics of labour market regulation, emphasizing the link between labour market rigidities and unemployment in the EU; 2) the emergence of the EES; and 3) the extent to which national labour law systems can be said to be converging or deregulating. Questions regarding the legitimacy and direction of EU regulation of the labour market are raised throughout the book, "in particular, the tension between state action (intergovernmentalism) and community competence (supranationalism), and that between regulation and deregulation."⁴⁸ These themes, which are raised in the introduction, inform the analysis of the seven substantive chapters that follow.

Chapters 1 and 2 will be of particular interest to the labour law generalist, since they canvass the economic arguments for and against labour market regulation, uncover the economic assumptions in the EES, and provide a framework of analysis. In the first chapter, Ashiagbor uses

⁴⁷ *Ibid.* at xii.

⁴⁸ Ashiagbor, *The European Employment Strategy*, *supra* note 6 at 4.

the new institutional economic analysis to critique neoclassical perspectives about the proper role of the law in governing the market. She nicely shows how the Coase theorem has been misinterpreted by lawyers and economists to justify market ordering as the starting point, when in fact “it does not so much advocate a particular policy but rather suggest a method for determining policy.”⁴⁹ Another problem she identifies with the typical “law and economics” (neoclassical) writing is that it starts from the assumption of zero transaction costs, although Coase is very clear that transaction costs matter. Ashiagbor notes the limits of the new institutional economics (that it tends to ignore history and politics, and see institutions simply as a functional solution to a problem of co-ordination or market failure since it operates within the neoclassical framework) and is explicit about her normative commitments — that efficiency cannot be the only goal of market regulation for reasons of political economy and social cohesion. Like Hepple, Ashiagbor draws on Hall and Soskice’s work to argue that there are a range of different institutional arrangements that can lead to efficient labour market outcomes. She makes a compelling case for “conceptualizing the market as an institution which has been constructed just as other institutions, and not as a natural phenomenon which somehow precedes state action.”⁵⁰

Chapter 2 provides a careful examination of the labour market flexibility debate and theories of unemployment. Ashiagbor focuses on the contrast between the experience in the US and Europe and does a superb job of unpacking the extravagant claims made by proponents of deregulation as the royal road to full employment. Although she acknowledges the impressive job growth in the US through the 1980s and 1990s, she demonstrates that the disparities between Europe and the US are not as great as traditionally conceived. She concludes:

Ultimately, the adoption of US-style reforms or convergence towards the US model of labour market regulation comes down to a matter of political economy; if there is a trade-off between social cohesion and equity on the one hand, and employment creation on the other, it would appear that individual EU Member States have, for the time being, chosen the former.⁵¹

Having provided the conceptual tools in Chapter 1 and the framework for analysis in Chapter 2, she turns to the policy documents in the next four chapters. Chapters 3 to 6 chart the emergence of an EES, beginning in 1992 with the Maastricht treaty, outlining its transformation

⁴⁹ *Ibid.* at 19 [footnote omitted].

⁵⁰ *Ibid.* at 32.

⁵¹ *Ibid.* at 69.

from a policy to a strategy from the time of the Treaty of Amsterdam in 1997, and culminating at the Lisbon Summit in 2000. Ashiagbor addresses the development of new “soft” legal techniques to implement the EES, and its influence on two Member States (the Netherlands and Britain), which have adopted different varieties of the “Third Way.” These chapters should be read by anyone interested in the EU social model, Third Way labour policies, or the OMC, which uses the management technique of benchmarking, indicators, guidelines, and national action plans as a form of soft regulation. The beauty of the EES is that it leaves actual policy design in the hands of the Member States but elevates the articulation of policy goals to the Community level. Ashiagbor demonstrates the shift from employment protection to employment creation and the marginalization of social policy within a broader economic policy discourse that emphasizes avoiding excessive government deficits. The Lisbon Employment Strategy in 2000 emphasized full employment, and Ashiagbor argues that in practice it signalled a deregulatory agenda for labour law.⁵²

In Chapter 5, having established the regulatory objectives of the EES, Ashiagbor concentrates on the regulatory techniques employed. Readers interested in the debate over new forms of governance, soft versus hard law, and theorizing regulation will benefit from this chapter. In her attempt to understand the open method of coordination in a theoretical light, she examines it through three lenses: reflexive law, democratic experimentalism, and policy learning. She concludes that the OMC is an alternative to centralized harmonization and regulatory competition only if it is anchored a robust normative framework. In Chapter 6 she shows how this form of soft law has had a hard impact by examining the influence of the EES on two countries that have embraced different versions of the Third Way. She provides a careful analysis of the Third Way and labour market policy. She concludes her excellent study by emphasizing the importance of background rules as a crucial factor in framing self-regulation and deliberative decision making of the type embodied in the OMC, and argues for the need to build social rights and labour standard into economic policies such as the EES if Europe is to retain a social model.

Employment Policy and the Regulation of Part-time Work in the European Union, an edited collection by Silvana Sciarra, Paul Davies, and Mark Freedland,⁵³ is an excellent companion to Ashiagbor’s book. Concentrating on the Framework Agreement⁵⁴ and the Directive on Part-

⁵² *Ibid.* at 162.

⁵³ *Supra* note 6.

⁵⁴ EU 9706131F.

time Work of 1997,⁵⁵ the collection focuses on identifying the new discourses in labour law, both normative and procedural, that have emerged out of the interaction between employment laws and policies of the EU and Member States. It is an exemplary piece of comparative labour law scholarship, which adopts a functional and structuralist approach. As Silvanna Sciarra describes, the national case studies provide information on political and social institutions, and appreciate the role of collective actors, as well as giving priority to comparing the means and the goals of specific policies.⁵⁶ The book also sets the standard for edited collections. The beauty of this collection is its coherence; the national studies all follow the same framework of analysis, which is explained by Paul Davies and Mark Freedland in their chapter on “The Role of EU Employment Law and Policy in the Demarginalization of Part-time Work: A Study of the Interaction between EU Regulation and Member State Regulation.”⁵⁷ The contributors examine part-time work because it lies at the intersection of soft law, the European employment policy, and hard law — which the Directive on Part-time Work represents.⁵⁸ What they want to ascertain is whether the notion of soft law hides a hierarchy of values and whether the circulation of information conceals an asymmetric decision-making system in which priorities are established at the community level rather than by Member States.⁵⁹

The book is divided into two parts. The first sets the stage for the seven national case studies, which cover France, Germany, Italy, the Netherlands, Spain, Sweden, and the UK. In the opening chapter, Sciarra discusses the importance of a comparative approach in understanding European employment law policy, describes the OMC and the challenge it poses to traditional conceptions of law, and provides a brief history of the Directive on Part-time Work. She notes that the emphasis on flexibility in the EES has important implications for understanding the Directive and the role of part-time work. In her chapter, Diamond Ashiagbor examines the legal status of the EES and the National Action Plans that are used to implement it on the one hand, and the Directive on Part-time Work on the other. She shows how the discourse of flexibility as a tool of employment creation permeates the Directive, which is designed to provide equal treatment of part-time workers with comparable full-time workers. In attempting to understand the

⁵⁵ EU Directive 97/81/EC.

⁵⁶ Silvanna Sciarra, “New Discourses in Labour Law: Part-time Work and the Paradigm of Flexibility” in Sciarra, Davies and Freedland, *supra* note 6, 3-34 at 9.

⁵⁷ In Sciarra, Davies and Freedland, *ibid.* at 63-84.

⁵⁸ Sciarra, *supra* note 56 at 16.

⁵⁹ *Ibid.* at 11.

interaction of the EES and the Directive, she focuses on the concepts of flexibility and quality of work, and she concludes that whereas “the Employment Strategy and guidelines view the use of part-time work essentially as a tool of job creation, the Directive places greater weight on the removal of discrimination against part-time workers and the quality of such work.”⁶⁰

In their chapter, which sets out the methodology deployed in the national cases studies and summarizes the general trends and findings, Davies and Freedland argue that part-time work has moved from the margins of employment policy to the centre of the labour market.⁶¹ They articulate a framework of analysis that involves establishing the policy objectives, the regulatory approaches, the regulatory techniques, and the relationship between them. They also divide the analysis into three temporal stages: the development of regulation of part-time work in Member States; the interaction between EU and Member States regulation; and the impact of the Directive and the EES upon the regulation of part-time work in Member States. They offer two striking observations. From their review of the case studies, they suggest “that it is appropriate to view EU regulation of part-time work as characterised, not so much by a simple failure of proactiveness in the protection of workers, but rather by a particular kind of reflexivity of the pattern of regulation which was becoming typical of Member States.”⁶² The term “reflexiveness” is used to indicate that the communication between the EU and Member States is circular and not vertical.

They also note that the “possibilities for ‘vertical dissonance’ within an appearance of formal compliance with EU regulation illustrate the amplitude of the regulatory space which the EU has created in relation to part-time work, and the diversity of national policies that may be pursued within it.”⁶³ To conclude, they pose the question of whether “the regulatory approach to part-time work might come to represent a paradigm of reflexivity and light touch intervention for future EU regulation in the employment sphere.”⁶⁴

In the second part, the seven national case studies of part-time work are presented. Each follows the framework laid out by Davies and Freedland, and all are rich in detail and insight. Such high-quality case

⁶⁰ Diamond Ashiagbor, “The European Employment Strategy and the Regulation of Part-time Work” in Sciarra, Davies and Freedland, *supra* note 6 at 62.

⁶¹ Davies and Freedland, *supra* note 57 at 63.

⁶² *Ibid.* at 76.

⁶³ *Ibid.* at 81.

⁶⁴ *Ibid.* at 82.

studies of seven countries is a great boon for researchers interested in part-time work and the impact of transnational labour regulation. Moreover, the diversity of part-time employment across countries is clear proof of the significance of institutions in shaping labour markets. The last three books featured in this review demonstrate how important it is to transcend legal formalism, which is limited to a simple description of legal institutions, rules, and norms, and to delve into other disciplines such as economics, history, sociology, and politics, in order to understand the function and impact of law. Methodology matters, but so does training. These books also illustrate the value that is added to legal understanding by professional academics who are both trained and compelled to grapple with the complexities of evidence, debates, and concepts. While this approach may make the narrative and argument more complex, it has a much better chance of capturing the subtlety and complexity of the relationship between transnational economic integration, labour regulation, and labour markets. Moreover, *Employment Policy and the Regulation of Part-time Work in the European Union* illustrates that it is possible for an edited collection to be more than the sum of its parts. All of the books reviewed indicate that one of the side effects of globalization has been to generate a resurgence in labour law scholarship. Readers who are concerned about the lot of working people in the post-Fordist economy can only hope that this will generate both a new will and new ideas for labour law reform at the national and subnational levels.