

THE CORPORATE CODES OF MULTINATIONALS: COMPANY CONSTITUTIONS BEYOND CORPORATE GOVERNANCE AND CO-DETERMINATION¹

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German co-determination is one of the casualties of globalisation. Thirty years ago, the battle for union participation in corporate boards seemed to come to a conciliatory conclusion in the historic compromise of the German co-determination law. In the meantime, the power ratios might well have altered to such an extent that the shareholders can celebrate a clear victory, whilst the trade unions are left to fight retreating battles. In company law, co-determination is being usurped by corporate governance.

Nevertheless, it is somewhat surprising that the self-same globalisation process, which pushed the German form of co-determination onto the back foot, contemporaneously forced a large number of multinationals to develop new forms of company constitutions, at a safe distance from the crossfire of corporate governance and co-determination.² The corporate codes of multinationals are directed neither at the interests of their shareholders, nor at the participation of the trade unions. These codes are different instances of corporate social responsibility with a potential that is hard to gauge.

The corporate codes of multinationals react to both new perils in the working environment and the disappearance of traditional actors due to the globalisation process: the worldwide inter-linking of markets, capital, and production facilitate a slackening of working conditions in developing countries and endanger the social achievements in developed industrial states, a situation in no way ameliorated by nation states policies. Hopes that traditional international organisations (particularly the International Labour Organisation) would come to rescue, have been disappointed because, although binding, their founding inter-state treaties are unenforceable. Similarly, social clauses in international trade contracts promise little. A strategy in which the pressure amassed by worldwide social conflicts, protest movements, domestic courts, non-governmental and international organisations, coerces multinationals into adopting codes of conduct in which they assume an obligation to uphold social standards, is more likely to succeed.³ A committed

¹ Translated from the German by Rory Stephen Brown. I would like to thank Anna Beckers for her help in preparing this article.

² See C. Scherrer & T. Greven, *Global Rules for Trade: Codes of Conduct, Social Labelling, Workers' Rights Clauses* (Münster: Westfälisches Dampfboot, 2001).

³ S. Picciotto, "Rights, Responsibilities and Regulation of International Business", (2003) 42 *Columbia Journal of Transnational Law*, p. 131, at 139; V. Haufler, *A Public Role for the Private*

advocate of industrial democracy observes, in the relative success of the corporate code,

“... the inexorable result of the shift of power subsequent to globalisation. Neither states nor international organisations can notably limit the room for manoeuvre enjoyed by multinationals. The latter insist upon their freedoms, guaranteed by the principle of voluntarism, and employ them to draft their own normative registers. Even when these rules do not correspond to the traditional notion of law, they are norms for which respect is a legitimate expectation. /It is imperative, therefore, that “soft law” does not remain merely cosmetic. If NGOs, the media, and perhaps also trade unions, intensify their efforts to promote an international consciousness which reflects the global civil society of the future in the world of work,, then we may set our hopes high.”⁴

This view is primarily interested in political strategies and their results. Legal aspects of the codes of conduct appear only at the periphery; that is to say, these codes occupy a juridical “no-man’s land”. As soft law, they are not enforceable; instead, they *morally* oblige companies. Everything depends on political relationships, namely, the pressure exerted by the leading actors and the mobilisation of the public.⁵ It would seem salutary, to ponder as to whether or not legal phenomena manifest themselves within corporate codes, which not only alter the *gravitas* of the law-giving institutions, but also, by dint of their juridical positivity, have a knock-on effect on political and economic relationships. The thesis proposed here is that corporate codes are emergent legal phenomena in the constitutionalisation of private governance regimes. Unlike when they were first spawned, they are no longer mere public relations strategies; instead, they have matured into genuine civil constitutions – in the fashion of constitutional pluralism. In what follows, five observable trends will be sketched in support of this contention: (I) Juridification; (II) Constitutionalisation; (III) Judicialisation; (IV) Hybridisation; and (V) Intermeshing.

I. PRIVATE JURIDIFICATION: CORPORATE CODES AS LAW WITHOUT THE STATE

By simply describing corporate codes as soft law, one sidesteps categorising them as law or non-law. Mindful of the grave consequences of this categorisation, such a

Sector: Industry Self-Regulation in a Global Economy, (Washington D.C.: Carnegie Endowment for International Peace, 2001); C.M. Dickerson, “Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field For Developing Workers”, (2001) 53 *Florida Law Review*, p. 611; H. Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation”, in: J. Conaghan, R.M. Fischl & K. Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, (Oxford: Oxford University Press, 2002), p. 471; O. Boiral, “The Certification of Corporate Conduct: Issues and Prospects”, (2003) 142 *International Labour Review*, p. 317; R. Jenkins “The Political Economy of Codes of Conduct”, in: R. Jenkins, R. Pearson & G. Seyfang (eds), *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan, 2002), p. 13; M. Posner & J. Nolan, “Can Codes of Conduct Play a Role in Promoting Workers’ Rights?” in: R.J. Flanagan & W.B. Gould IV (eds), *International Labor Standards: Globalization, Trade, and Public Policy* (Stanford: Stanford Law and Policy, 2003), p. 207.

⁴ M. Weiss, “Gefangen im globalen Wettbewerb: Chancen und Grenzen des Arbeitsrecht: Internationale Organisationen, staatliche Eigeninteressen und multinationale Konzerne”, (2004) 22 *Forschung Frankfurt*, p. 15.

⁵ *Ibid.*

sidestep is inadvisable. Corporate codes beg the same question as *lex mercatoria*, internet law and other global regimes in which private actors make rules, the binding nature of which is not guaranteed by state power, yet which display a high normative efficacy. Are we considering social norms or real law? For the time-being, the conclusion that we are experiencing real law has been arrived at in various vehicles of social and legal theory: legal pluralism,⁶ post-modern governance,⁷ social fields,⁸ systems,⁹ and soft-law.¹⁰

What we are observing here is the emergence of a legal discourse of global dimensions, the boundaries of which are drawn by the binary code of legal and illegal, and which self-perpetuates by recycling symbolic global (not national) validity. The first criterion, binary code, distinguishes global law from economic and other social processes. The second criterion, global validity, differentiates between national and international legal phenomena. Both criteria are instruments of second order observation. Thereby, law observes its own operations in the environs of national legal orders and global social systems.

Corporate codes call for differentiation. Not every formalised statement of corporate social responsibility by a multinational can be attributed legal character. Only when particular conditions are fulfilled can we talk of law in the real sense. To date, Martin Herberg has undertaken the most detailed examination of the necessary normative structures,¹¹ and asserts that it is the interplay between three levels of norms that transforms the codes into genuine laws. Hence, codes of conduct take on legal character if:

- first, at the upper level, firm-specific self-commitments and guidelines exist, under conditions of increasing legal porosity; they are an important means for development of trust and for the discovery of legitimacy;

⁶ J. Griffiths, "What is Legal Pluralism", (1986) 24 *Journal of Legal Pluralism*, p. 1; S.E. Merry, "Legal Pluralism", (1988) 22 *Law and Society Review*, p. 869; H. Peterson & H. Zahle, *Legal Polycentricity: Consequences of Pluralism in Law*, (Aldershot: Dartmouth, 1995).

⁷ G. Stoker, "Governance as Theory", (1998) 155 *International Social Science Journal*, p. 17.

⁸ P. Bourdieu, "The Force of Law: Toward a Theory of the Juridical Field", (1987) 38 *Hastings Law Journal*, p. 808.

⁹ G. Teubner (ed), *Global Law Without A State*, (Aldershot: Dartmouth, 1997); J. Priban & D. Nelken, *Law's New Boundaries: The Consequences of Legal Autopoiesis*, (Aldershot: Dartmouth, 2001); G.-P. Calliess, *Grenzüberschreitenden Verbraucherverträge*, (Tübingen: Mohr Siebeck, 2006), at 176 *et seq.*

¹⁰ S. Sciarra, "Social Values and the Multiple Sources of European Law", (1995) 1 *European Law Journal*, p. 60; A.E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", (1999) 48 *International and Comparative Law Quarterly*, p. 901.

¹¹ M. Herberg, "Private Authority, Global Governance, and the Law. The Case of Environmental Self-Regulation in Multinational Enterprises", in: G. Winter (ed), *Multilevel Governance of Global Environmental Change. Perspectives from Science, Sociology and the Law*, (Cambridge: Cambridge University Press, 2006), p. 149; *idem*, *Globalisierung und private Selbstregulierung* (Frankfurt, Campus, 2007); *idem*, "Erzeugen multinationale Unternehmen ihr eigenes Umweltrecht? Bausteine zu einer Theorie transnationaler Regulative" in G. Winter (ed.), *Die Umweltverantwortung multinationaler Konzerne. Selbststeuerung und Recht bei Auslandsdirektinvestitionen*, (Baden-Baden Nomos, 2005), p. 73. These studies are primarily concerned with corporate codes relating to the environment, but are, *mutatis mutandis*, relevant to labour law.

- second, at the central level, activities of the internal regulatory and executive organs work, partially and variably, as advisers, investigators and enforcers, and frequently as developers of valid norms;
- third, at the lower level, concrete technical and organisational rules exist, which, so to say, identify the operative core of the regulatory organs; they comprise duties and tasks, which one could not cast in this concrete form from the guidelines, and which, at times, take on the format of implicit basic rules and indices of normality.

Herberg thus puts forward a catalogue of additional features upon which the legal character of a code is contingent. It must: be an inter-linking bundle of inter-related norms, rules and procedures (which typically also includes very concrete guidelines for specific situations), clearly distinguish between permissible and impermissible practices, and give its addressees a reliable means of orientation. An additional indicator is the component of factual efficacy, which comes to being, partially, by dint of the internal binding and persuasive force of the rules, and partially through instruments of surveillance and enforcement. One fundamental definitional pre-requisite is the development of specific, distinguishable organs whose central task is the maintenance and further advancement of the normative order.

To be sure, a clear legal theoretical orientation can only be developed if one can trace these combinations of features back to “secondary norm-formation processes”. Contrary to several sociological or economic formulations, not every norm formation or “private ordering” is law. The indifference with regard to the legal proprium, which such theories exhibit, would be fatal to any socio-legal or doctrinal analysis, which *per force* concerns itself with the internal rationality and normativity of law.¹² In order to avoid the misunderstandings about a system-theoretical approach, it must be stressed that the usage of the binary code is insufficient for the identification of law. The institutionalisation of processes of secondary norm-formation is decisive. This not only recalls Herbert Hart’s definition of law as the unity of primary and secondary norms,¹³ but also goes beyond it, since it replaces structural with operational orientation. Only when institutional arrangements which systematically subordinate the first order observations to the second order observation of a legal code exist, can we speak of autonomous law (with or without the involvement of the state). A “global law without a state” should not yet be assumed upon the basis that non-state institutions judge behaviour pursuant to the normative code, but, rather, that it may be acknowledged only when processes which observe these judicial functions under the binary legal code have been institutionalised. Only then do corporate codes satisfy the structural pre-requisites of a transnational law outside of state law.

¹² J. Griffiths (*supra* note 6), at 1 *et seq.*, in his description of legal pluralism as a plethora of systems of “social control”, is rather insensitive with respect to the legal proprium. As to the indifference of economic analysis of “private ordering”, see A. Aviram, “A Network Effects Analysis of Private Ordering”, (2003) 80 *Berkeley Program in Law and Economics Working Paper Series* 5, available at: <http://repositories.cdlib.org/blewp/>.

¹³ For the parallel attempt to Kelsen’s ideas on customary international law and the Grundnorm, see A. Fischer-Lescano, “Monismus, Dualismus? – Pluralismus. Selbstbestimmung des Weltrechts bei Hans Kelsen und Niklas Luhmann”, in: H. Brunkhorst & R. Voigt (eds), *Rechts-staat: Staat, internationale Gemeinschaft und Völkerrecht bei Hans Kelsen*, (Baden-Baden: Nomos, 2008, forthcoming).

“Transnational law describes a third category of an autonomous legal system that goes beyond the traditional categories of national and international law. It is created and developed through the legislative powers of a global civil society and based upon general legal principles and their crystallisation in civil practice. Private conflict resolvers are responsible for its usage, interpretation and furtherance, and a codification - if one appears at all – will appear in the form of general principles and rules, standard contract forms, or codes of conduct, which are established by private standardising institutions.”¹⁴

To stress this point again, in order for private ordering to qualify as genuine law, it is not sufficient that the pertinent behavioural rules are alloyed to the notion of legal or illegal. Instead, the rules must themselves be subjugated to a process, in which they are judged according to the legal code. This reflexive process requires certain institutional precautions, in particular, the development of actors or instances, who or which are responsible for the establishment, modification, interpretation and implementation of the primary norm formation. Fundamental to this is the growth of the central level of internal control and implementation organs, which mediates between the two other normative levels, thusly grounding the legal character of the corporate code.

A more exacting determination of whether corporate codes constitute law, the question of whether such self-curtailments qualify can be supported by two perspectives. From the outside, the code appears to be a contractual obligation or a unilateral public declaration, designed to transform political statements into binding legal form. From the inside, the code seems to be a corporate act, through which associative rules become binding for the organs of the company, in an internal relationship to the organs and the shareholders as well as in a labour law relation to the workers. The interplay between the company law rules and the external efficacy of these rules does merit further examination. It is worthwhile drawing a parallel here between the interplay of international law covenants and unilateral governmental declarations, and the effect of the former on laws of the constitutional variety in the domestic legal order. It should, therefore, become clear that these norms, pursuant to their double-juridification, have binding legal force. Moreover, according to the argument here, they represent genuine legal norms in both the sociological and the juridical sense.

II. CIVIC CONSTITUTIONALISATION: ELEMENTS OF A COMMUNAL CONSTITUTION

Even more astonishing than their qualification as law in the formal sense, is the peculiar constitutional element exhibited by such private codifications of corporate rules. The reflexive legal standardisation, which takes place at the central level, substantiates the transposition of the corporate code from social norms into legal norms, without, however, *stricto sensu*, representing a constitutionalisation. This occurs only when the reflexive processes in the organisations are appended to

¹⁴ G.-P. Calliess, “Transnationales Verbrauchervertragsrecht”, (2004) 68 *Rabels Zeitschrift*, p. 244, at 254 *et seq.*; for the terminological history of transnational law, see H.H. Koh, “Transnational Legal Process”, (1996) 75 *Nebraska Law Review*, p. 181; see, further, F. Hanschmann, “Theorie transnationaler Rechtsprozesse”, in: S. Buckel, R. Christensen & A. Fischer-Lescano (eds), *Neue Theorien des Rechts*, (Stuttgart: Lucius & Lucius, 2006), p. 235; P. Schiff Berman, “From International Law to Law and Globalization”, (2005) 43 *Columbia Journal of Transnational Law*, p. 458.

reflexive legal processes - in other words, when inter-systemic linking institutions tie together secondary rule-making in the law with fundamental, rational principles of the organisation.¹⁵ This is based upon a constitutional concept which is not limited to nation states constitutions, but which, instead requires that, under particular historical conditions, even non-state civic orders give birth to autonomous constitutionalisation. The positivisation of constitutional norms moves from the global political level to various social sectors, which, in parallel to political constitutions, produce their own constitutions of civil society.¹⁶ Pursuant to the concept of constitutional pluralism, one can speak of a constitution of a community outside of the domestic context, when the following conditions are fulfilled:

“(i) the development of an explicit constitutional discourse and constitutional self-consciousness; (ii) a claim to foundational legal authority, or sovereignty, whereas sovereignty is not viewed as absolute; (iii) the delineation of a sphere of competences; (iv) the existence of an organ internal to the polity with interpretative autonomy with regard to the meaning and the scope of the competences; (v) the existence of an institutional structure to govern the polity; (vi) rights and obligations of citizenship, understood in a broad sense; and (vii) specification of the terms of representation of the citizens in the polity.”¹⁷

The expressions “polity”, “governing”, and “representation” may not be understood in the narrow sense of an institutionalised political system, but may,

¹⁵ See, further, on these processes of auto-constitutionalisation: G. Teubner, “Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie”, (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, p. 1; A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, (Frankfurt aM: Suhrkamp, 2006), at 53 *et seq.*

¹⁶ As to the concept of “societal constitutionalism” in social theory, see D. Sciulli, *Theory of Societal Constitutionalism*, (Cambridge: Cambridge University Press, 1992), at 21 *et seq.*; *idem*, *Corporate Power in Civil Society: An Application of Societal Constitutionalism*, (New York: New York University Press, 2001), at 131 *et seq.*; G. Teubner (*supra* note 15), at 1 *et seq.*; on plural constitutionalism, see N. Walker, “The Idea of Constitutional Pluralism”, (2002) 65 *Modern Law Review*, p. 317; C. Walter, “Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law”, (2001) 44 *German Yearbook of International Law*, p. 170; A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, (Weilerswist: Velbrück, 2005), at 247 *et seq.*; H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, (Frankfurt aM: Suhrkamp, 2002), at 203 *et seq.*; G.-P. Calliess, “Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law”, (2002) 24 *Zeitschrift für Rechtssoziologie*, p. 185; T. Cottier & M. Hertig, “The Prospects of 21st Century Constitutionalism”, (2003) 7 *Max Planck Yearbook of United Nations Law* 261; H. Schepel, “Constituting Private Governance Regimes: Standards Bodies in American Law”, in: Ch. Joerges & G. Teubner (eds), *Constitutionalism and Transnational Governance*, (Oxford: Hart Publishing, 2004), 161; C. Scott & R. Wai, “Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational ‘Private’ Litigation”, in: Ch. Joerges, I.-J. Sand & G. Teubner (eds), *Transnational Governance and Constitutionalism*, (Oxford: Hart Publishing, 2004), p. 287. On a global economic constitution, see H. Arthurs & R. Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy”, (1996) 34 *Osgoode Hall Law Journal*, p. 1, at 4; D.Z. Cass, “The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade”, (2001) 12 *European Journal of International Law*, p. 39, at 40 *et seq.*; R. de Lange, “Divergence, Fragmentation, and Pluralism. Notes on Polycentricity and Unity in Law”, in: H. Petersen & H. Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law*, (Aldershot: Dartmouth, 1995), p. 103, at 112 *et seq.*

¹⁷ N. Walker, “The EU and the WTO: Constitutionalism in a New Key”, in: G. de Burca & J. Scott (eds), *The EU and the WTO. Legal and Constitutional Issues*, (London: Hart Publishing, 2001), p. 31, at 33.

instead, also denote an “unpolitical” civic manifestation, be it economic, scientific, educational, health-related, artistic or sporting, in which the global constitutionalisation process takes place.¹⁸

Therefore, an autonomous, non-state, non-political, civic constitutionalisation of multinationals takes place if reflexive social processes, which concern the relationship of the multinational in its various environs, are interwoven with reflexive legal processes. Under these conditions, it makes sense to speak of elements of a genuine constitution in the corporate codes of multinationals. We can observe the typical components of a constitution: regulations about the establishment and functioning of decision-making processes (organisational and procedural rules), and the codification of the boundaries of the organisation in relation to individual freedoms and civil liberties (basic rights).

The norms of the upper level of the codes are orientated towards precisely these conditions. They concern the underlying decision-making processes of the multinational, which pertain to the organisation’s relationship to its employees, whose rights it respects. The guidelines at this upper level are the genuine constitutional norms of the multinationals. By dint of their structure, these directives are neither substantive rules, such as the standards at the lower level, nor mere procedural norms such as those at the central level. Instead, they are explicit superior norms of the company constitution, which are formulated as general principles, and serve both as the departure point for internal norm-generation and as the yardsticks of the internal and external reviews.

To speak of the “limits on power” due to the external effects of organisational action, as Herberg does, is not idle, but is too close to conceptions of the division of powers in a state constitution.¹⁹ It would be more accurate to speak not only of the curtailments of freedom in situations in which economic power relations manifest themselves, but also, more comprehensively, of externally imposed self-restraint of the organisational matrix, due to its negative externalities.²⁰ The problem centres on the negative externalities of the profit principle, the chosen production technologies, and the formal organisation. We are not concerned here with a transfer of the rights of basic national law as a result of the exercise of power by societal actors, but, instead, with basic rights, which actively oppose the external effects of such pursuits. The constitutional question of globalised civic sectors is thoroughly reminiscent of the constitutional question of the nation state of the 18th and 19th centuries.

III. INTERNATIONAL JUDICIALISATION: CORPORATE CODES IN CONFLICT WITH STATE LAWS

The juridification and constitutionalisation of multinationals through corporate codes are instances of independent law-formation, and therefore have little to do with

¹⁸ This receives special emphasis in D. Sciulli (*supra* note 16, 1992) at 21 *et seq.*; G. Teubner (*supra* note 15), at 1 *et seq.*; H. Brunkhorst (*supra* note 16), at 203 *et seq.*; A. Fischer-Lescano (*supra* note 16), at 195 *et seq.*; Ch. Joerges, H. Schepel & E. Vos, “The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardisation under the ‘New Approach’”, in European University Institute (eds), *EUI Working Papers* No. 99/9 (San Domenico: Badia Fiesolana, 1999), 1 *et seq.*; L. Scott & R. Wai (*supra* note 16), at 287 *et seq.*

¹⁹ M. Herberg (*supra* note 11).

²⁰ For more details, see G. Teubner, “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors”, (2006) 69 *Modern Law Review*, p. 327.

national or international politics and law. Corporate codes produce global laws and global constitutions without a state. In the light of globalisation's tendency? to differentiate between politics and law more than in the nation-state, the relation of these corporate codes to national and international law, on the one hand, and to national and international politics, on the other, need to be discussed separately.

One important condition for the success of corporate codes is their interaction with national legal systems. The effectuation of this interaction should be one of the most important tasks. But these efforts come up against the tough and enduring resistance of multinationals, which jealously guard their "sovereignty" over their corporate codes, and which are fain to avoid judicial reviews. For the implementation success of codes of conduct, their judicialisation in the national legal order will be one of the most important pre-requisites.²¹ At the same time, it should be clear that their reception in national law is not a condition of the legal character or binding effect of the codes. Both are produced by the juridification and the constitutionalising processes in the company, and also in interactions with actors external to it.

It should be equally apparent that this interaction with state law does not signify the transformation of a legal register of civil society into domestic law. The corporate codes are neither prescribed by national legislation, nor adopted, nor integrated. More pertinent is the notion of conflict of laws: the autonomous legal orders of the multinationals collide with national and international laws. In this collision between autonomous legal orders, both undergo a deep process of change. In the event, corporate codes are not subordinated to domestic law, nor is domestic law ousted by the codes, rather there is a reciprocal reconstruction of the state law in the corporate code and *vice versa*. Existing conflicts law is not equipped for such transnational and transinstitutional collisions. The problems arising here can be overcome through a new law of conflicts, which, unlike the traditional territorial jurisdictional predicates of international private law, locates itself in a plurality of national, international and corporate legal systems.²² From the offset, a substantive law approach would be preferable, which, by virtue of the transnational and transinstitutional collisions, makes it impossible to refer the conflict exclusively to one of the colliding legal orders. Here, we are concerned with regime-transcending legal conflicts, with effects in both legal orders. The only escape route in such a case of inter-regime conflict would be for the tribunal concerned to develop its own substantive norms. Mindful of the "domestic" and the "foreign" legal order, and with one eye on the third order, trans-institutional substantive norms, following the fashion of an asymmetrical law-mélange, could be formed. The goal would be that, in such conflicts, organisational, international and national norms could jostle for position. The challenge for the relevant national, international and "private" conflict resolution tribunals is to approach the quandary in such a manner that they distil the pertinent laws from the territorial, organisational or institutional legal context, and creatively combine them to form genuine transnational norms. Each tribunal *per force* "legislates" from its own perspective, and no hierarchy of tribunals exists to rank their

²¹ See the conclusions drawn by R. Zimmer from an empirical study of corporate codes in Salvador: R. Zimmer, "Menschenrechte der Arbeiterinnen werden häufig missachtet", *Frankfurter Rundschau*, 12 September 2006, available at: <http://www.fr-online.de>.

²² With regard to these new conflicts, see A. Fischer-Lescano & G. Teubner (*supra* note 15); P. Schiff Berman (*supra* note 14); R. Michaels, "The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism", (2005) 51 *Wayne Law Review*, p. 1209.

efforts. Thus, the most pressing task might be the organisation of mutual awareness and reciprocal acknowledgement between decentralised tribunals.

IV. REGULATORY HYBRIDISATION: THE MIXING OF PRIVATE AND PUBLIC POLICY

Similar to the importance of their co-ordination with the global legal system, the success of corporate codes depends on their interaction with political regulatory bodies. A great deal hinges on whether or not political pressure leads to the subjection of autonomous corporate codes to external regulatory impulses. Here, again, collective actors outside the company – NGOs, trade unions, media, international organisations and administrative agencies – play a decisive role, in offsetting the closure tendencies of the company both in terms of the formulation of the code and also its implementation and future development.

As to the relationship between corporate codes and political normative orders, the question is not of a simple re-integration of private rules into political-state norms. The comprehensive transformation of purely voluntary codes into state-regulated and state-implemented registers is neither probable nor desirable. Instead, the hybridisation of the corporate codes is a developmental trend, in which the autonomy of the codes is preserved, but in which state agencies and international organisations are involved to the extent that they contribute to the delineation of the borders of the private code and to its implementation and regulation. Only by a complex of strategies and only with co-operation, will multinationals, international organisations, state governments, employers' syndicates, trade unions, and NGOs be able to approach the goal of the worldwide establishment of employees' rights – not only on paper but also in practice. In fact, mutual agreement between the various actors will be crucial.

V. INTER-ORGANISATIONAL CO-OPERATION: THE EXTENSION OF THE CORPORATE CODES INTO PRODUCTION NETWORKS

That corporate codes only work as the internal self-regulation of a single multinational and do not control the entire value-creating chain of production and distribution represents a grave flaw. Consequently, the key players in an industry boast relatively high labour law standards, whilst the working conditions in peripheral companies are significantly worse. Recently, a trend that counters these tendencies has been observable: the emergence of inter-company networks as an extension of the corporate code onto an entire production network. Global commodity chains have developed, which constitute neither market relationships nor integrated multinationals.²³ Instead, what we can observe are networks of independent companies, which have generated their own governance structures. Two types may be distinguished: producer-driven and buyer-driven chains. The nerve centre of the network lies either in the ambit of manufacture or in the domain of consumption.

For corporate codes, it is important that the organisational features of the network offer certain advantages, making it possible to extend the reach of the code to several inter-linking companies.²⁴ The over-reaching governance structures of the

²³ G. Gereffi & M. Korzeniewicz, *Commodity Chains and Global Capitalism*, (Westport: Greenwood Press, 1994).

²⁴ See, for more proofs, M. Fichter & J. Sydow, "Using Networks Toward Global Labor Standards? Organizing Social Responsibility in Global Production Chains", (2002) 9 *Industrielle Beziehungen*,

network facilitate – in spite of the independence of nodal companies – the centralising function of the codes as well as their unified validity in the total production chain. The role of the network's nerve centre, whose considerable influence on the other parts of the network promotes the universal usage of the code, is of imperative importance. Moreover, we can observe an interplay between factors internal to companies and inter-organisational features. Control and implementation structures developed in the nerve centre, for example, a social responsibility task force or a responsible officer, spread through the network to the other companies and facilitate the co-ordination of the various internal corporate codes.

Only when these five elements - private juridification, civic constitutionalism, international judicialisation, regulatory hybridisation and interorganisational networks – emerge simultaneously in the future, might we be justified in making cautiously optimistic prognoses for corporate codes. Finally, their success depends on a combination of political and legal constellations, which, on the one hand, allows pressure from external actors – that is to say, from NGOs, trade unions, media, international organisations, and domestic organs – to be effective, and, on the other, give impetus to a juridification of the civic norms and their interaction with state law so that the codes constitute, not a corporate fad, but permanent valid law which generates durable legal institutions, and which guarantees the preservation of high labour law standards. As demonstrated by recent empirical studies, the juridification of corporate codes, *i.e.*, their metamorphosis into concrete rights, the transgression of which entails damages or other sanctions, represents a crucial condition to their success.²⁵

²⁵ p. 357.
R. Zimmer (*supra* note 21).