

# Transnational Economic Constitutionalism in the Varieties of Capitalism\*

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### Abstract

Notwithstanding the ordoliberal theories and the theories critical of a world 'economic constitution', globalization has not produced a unitary economic constitution, but a fragmented constitution of collisions: ie a metaconstitution of constitutional conflicts, whose conflicting units are no longer the national States, but the regimes of transnational production. The alternative (developed for national States by Franz Böhm and Hugo Sinzheimer) between an ordoliberal economic constitution and a social democratic economic democracy has resulted – as regards the current transnational economic constitution – in the opposition between continental Europe's production regimes organized in a neo-corporative way on one hand, and Anglo-American inspired production regimes characterized by financial capitalism on the other. Contrary to all expectations, continental Europe's neo-corporative economic constitutions have revealed a surprising resilience, notwithstanding globalization and the economic crisis. New opportunities for an economic-democratic constitutionalization are emerging in as much as social forces outside the corporation (and so, in addition to state intervention, legal regulations and the counterpowers of 'civil society' coming from other contexts: media, public discussion, spontaneous protest, intellectuals, opposing social movements, non-governmental organizations (NGOs), trade unions, professions) are putting such intense pressure on corporations so as to force them to self-limitations driven by the public wealth, as demonstrated by the '*Corporate Codes*' case.

### I. Lessons from the Classics?

Economic constitutionalism – it was Weimar Germany in the 1920s where this concept had been invented and where institutional experiments had been initiated. Social democracy and ordo-

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liberalism had dominated the fights for conceptual hegemony. Can the contemporary debate on transnational economic constitutionalism learn from the German classics of the national economic constitution – Hugo Sinzheimer and Franz Böhm? Or can it only attest to the grandiose failure of both of them? Sinzheimer, whose great contributions were to have invented the concept of the collective labor contract and to have introduced elements of economic democracy into the Weimar constitution, in fact failed with his further reaching ambitions for a comprehensive system of economic workers councils. Franz Böhm – during his opposition to the national socialist regime – worked on an ordo-liberal economic constitution for the future, and then later on the anti-trust law that markedly influenced the economy of federal Germany. He would – from his ordo-liberal conceptions of a decentralized, middle-class influenced, competitive market under state supervision – recognize hardly anything in the contemporary globalized world markets dominated by transnational enterprises.<sup>1</sup>

Of course, it is only a superficial critique to evaluate their time-bound concepts of legal policy by contemporary realities. Instead, one should look for Böhm's and Sinzheimer's potential to challenge the contemporary debate. The challenge is whether their ideas, originally developed for the economy of the nation state, can be fruitfully re-conceptualized for the contemporary globalized economy. Then one could replace the superficial question – 'Which of them delivered the better prognosis?' – with a different question – 'If, back then, Böhm suggested an ordo-liberal economic

<sup>1</sup> On Franz Böhm: H. Grosseckler, 'Franz Böhm (1895-1977)', in J. Backhaus ed, *The Elgar Companion to Law and Economics* (Cheltenham: Elgar, 2005), 489-497. On Hugo Sinzheimer: O. Kahn-Freund, 'Hugo Sinzheimer 1875-1945', in R. Lewis and J. Clark eds, *Labour Law and Politics in the Weimar Republic* (Oxford: Basil Blackwell, 1981), 73-103. Böhm's early key work: F. Böhm, *Wettbewerb und Monopolkampf* (Berlin: Heymanns, 1933); his essays on the economic constitution in E.J. Mestmäcker ed, *Reden und Schriften über die Ordnung einer freien Gesellschaft, einer freien Wirtschaft und über die Wiedergutmachung* (Karlsruhe: C.F. Müller, 1960). Sinzheimer's early key work: H. Sinzheimer, *Ein Arbeitstarifgesetz. Die Idee der sozialen Selbstbestimmung im Recht* (Munich: Duncker & Humblot, 1916). Important essays on the economic constitution: H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden* (Frankfurt: Europäische Verlagsanstalt, 1976).

constitution and Sinzheimer a social-democratic economic democracy as realistic third ways between Manchester capitalism and state socialism, what would a realistic constitutional alternative look like for the transnational economy today?' Beyond these concrete questions one may seek the results garnered by both scholars at a more abstract level. For both defined the 'economic constitution' in the very first place as a legal concept based on social theory; today's research efforts can build upon them. On a more abstract level, it is worth discussing anew and under today's conditions their ideas on social theory and the theory of democracy, which went far beyond the simple organization of markets and enterprises. Their future applicability must prove itself on both these levels: of concrete economic law on the one hand and of abstract theories on the other.

In this spirit I would like to develop the following three theses:

1. The legal concept of the transnational economic constitution should be grasped with greater nuance, as contrasted against a definition which sees it as the mere diversity of national economic constitutions, but also in contrast to the simple unity of a global economic constitution. It needs to be redefined as the constitution of collisions between different production regimes in the varieties of capitalism.

2. The economic constitution is not identical with those portions of state-constitutions, which refer to the economy. Likewise, it cannot be limited to the higher-ranking norms in a hierarchy of norms regulating the economy. Instead, it should be understood as a phenomenon of 'double reflexivity', in which the fundamental institutions of an economic production regime enter into an indivisible relation with the rules of constitutional law.

3. Legal norms of economic democracy differ in their chances for realization, according to how trenchant the differences are in which the internal differentiations of the transnational economic constitution are formed out. From the perspective of the varieties of capitalism, in 'coordinated market economies' (CMEs) the potential for economic democracy is considerably higher than in 'liberal market economies' (LMEs).

## II. On the Substrate of a Transnational Economic Constitution

The successors to Franz Böhm's attempted to free up his ordo-liberal concept of the economic constitution from the narrow framework of nation-state and national economy in which it was trapped in Böhm's thought and transfer it into an overarching transnational economic constitution. Ernst-Joachim Mestmäcker proposed a concept of a European economic constitution and evoked it into a partially successful institutionalization of ordo-liberal constitutional principles in the European Union. On the global scale, Wolfgang Fikentscher and Peter Behrens suggested the legal concept of a unitary global economic constitution on ordo-liberal foundations.<sup>2</sup> Entirely in Böhm's sense, norms should build a protective wall against the self-destruction of competition.

Parallel thereto, even if with exactly opposed political goals, authors such as Stephen Gill, David Schneiderman and James Tully in the tradition of critical theory diagnosed a 'New Constitutionalism' which institutionalizes a unitary constitution of the global economy proceeding from the institutions of the Washington Consensus.<sup>3</sup>

Both theories can refer to developments in the economic reality. In the last thirty years a push for constitutionalization based on the autonomy of global markets has been massively driven forward politically. The global institutions of the Washington consensus posited genuine constitutional principles with claims to world-wide validity. These sought to create broad discretionary space for enterprises acting globally, to do away with governmental participation in enterprises, to combat protectionism, and to free

<sup>2</sup> E.J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Baden-Baden: Nomos, 2006); W. Fikentscher, *Wirtschaftsrecht* (Tübingen: Mohr Siebeck, 1983), 87 et seq; P. Behrens, 'Weltwirtschaftsverfassung' 19 *Jahrbuch für Neue Politische Ökonomie*, 5-27 (2000).

<sup>3</sup> S. Gill and A. Claire Cutler eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014); D. Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013); Id, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008), 340 et seq; J. Tully, 'The Imperialism of Modern Constitutional Democracy', in N. Walker and M. Loughlin eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 315-338.

economic enterprises from political regulations. Meanwhile, numerous studies have shown that indeed elements of a global economic constitution have emerged, which are based on the constitutionalization of various transnational regimes. Eg the guiding principle of the International Monetary Fund and the World Bank is to open national capital markets. The World Trade Organization (WTO) as well as the EC internal market, the North American Free Trade Agreement (NAFTA), the Mercado Común del Cono Sur (MERCOSUR) or the Asia Pacific Economic Cooperation (APEC) seek respectively a constitutional guarantee for the freedom of world trade and the protection of direct investment.<sup>4</sup> *Lex mercatoria* has also formed a layer of constitutional norms beyond its contract law rules, concentrated on the constitutive function. 'Private' arbitration courts posit property, contractual freedom, and competition as essential components of transnational public policy.<sup>5</sup> Global corporate charters are likewise marked by their tendency to create a high degree of autonomy for transnational enterprises.<sup>6</sup> The principles of corporate governance of multinational enterprises are: a high degree of enterprise autonomy, capital market orientation of corporate law norms, and the establishment of shareholder values. The resulting multinational corporate governance aims at two goals: to break the tight coupling of transnational enterprises on nation-

<sup>4</sup> On the constitutional character of the transnational trade regime, see E.U. Petersmann, *International Economic Law in the 21st Century* (Oxford: Hart, 2012); D.Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

<sup>5</sup> Elements of a transnational economic constitution have been identified in the 'private' arbitration regime by M. Renner, 'Towards a Hierarchy of Norms in Transnational Law' 26 *Journal of International Arbitration*, 533-555 (2009). To the same subject, but using natural law terminology to emphasize the fundamental character of the relevant norms, see J.H. Dalhuisen, 'Legal Orders and their Manifestations: The Operation of the International Commercial and Financial Legal Order and its *Lex Mercatoria*' 24 *Berkeley Journal of International Law*, 129-191 (2006).

<sup>6</sup> On the new enterprise charters of Global Corporate Governance, see L. Catá Backer, 'Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems', in G. Handl et al eds, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Nijhoff, 2012), 87-123.

state politics and rules and to build up rule of law structures in so far as these are necessary for their world-wide functionally specified communication.

However, such analyses of transnational constitutionalization give us a skewed picture. They are one-sidedly obliged to the so-called convergence thesis, according to which as a result of globalization a broad-ranging legal unification is to be expected.<sup>7</sup> According to this thesis, in contemporary Europeanization and globalization, convergence of social economic structures of advanced industrial societies is inevitable. Such supposed social-economic convergence lets legal unification right on up to a unitary world-wide economic constitution appear to be realistic and desirable. A connected corollary is the functional equivalence of legal forms.<sup>8</sup> According to this, the national economic constitutions are based on differing legal doctrinal traditions, however they are all confronted by the same structural problems. Accordingly, they will find differing doctrinal solutions for the relevant problems, which however are functionally equivalent and which from their side finally lead to the convergence of national economic constitutions.

Both propositions are however more than questionable. In the current phase of globalization their opposite appears to be more plausible. The trend to globalization leads, paradoxical though it sounds, not necessarily to a convergence of social orders and a unification of law. Rather, globalization itself produces new sharp differences.<sup>9</sup> This leads not to greater legal unification, but rather to

<sup>7</sup> *Locus classicus*: C. Kerr et al eds, *Industrialism and Industrial Man* (Cambridge, Mass: Harvard University Press, 1960).

<sup>8</sup> In this sense, see K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1992), § 3, II; for a critique, G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' 26 *Harvard International Law Journal*, 411-455 (1985); for a reconstruction, R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339-382.

<sup>9</sup> Already in the early discussion on globalization it became clear that S.P. Huntington, 'The Clash of Civilizations' 72 *Foreign Affairs*, 22-49 (1993) with his apocalyptic predictions had exaggerated global divisions. A more realistic view sees a simultaneous increase in convergence and divergence as a consequence of globalization: M. Featherstone and S. Lash, 'Globalization, Modernity and the Spatialization of Social Theory', in M. Featherstone et al eds, *Global Modernities* (London: Sage, 1995), 1-24.

a stronger fragmentation of legal orders as a direct consequence of globalization.

Comparative political economy confronts us with surprising empirical results, which fundamentally place the expectations of convergence of economic constitutions into question.<sup>10</sup> These results are confirmed by economic history studies on the autonomous cultures of the global economy, which from a perspective of *longue durée* show the resiliency of collective mentalities and particularities of production cultures.<sup>11</sup> Empirical inquiries and theoretical explanations of the ‘varieties of capitalism’ support the proposition that, against all expectations, the globalization of markets and the computerization of the economy have not led to an efficient convergence of economic institutions and economic constitutional law norms. Despite all assertions of minimization of transaction costs, market selection, re-litigation, and regulatory competition, which indeed ought as evolutionary selectors to have effectively smoothed out institutional differences, the economic conditions of advanced capitalism have not converged.<sup>12</sup> Just the opposite, the process of globalization, and yes even the unification measures in the European common market, have produced new institutional divergences. Despite the liberalization of the global market and the erection of the common market, one of the most noteworthy results of the last forty years is that in the most varied economic institutions – in the financial regimes of enterprises, in the arrangements of corporate governance, in collective labor relations, the education of managers, in the contractual relations between enterprises, in inter-

<sup>10</sup> The leading representative is P.A. Hall and D. Soskice eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2005); for recent analysis, see: A. Hassel, ‘Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe’ 76 *The London School of Economics ‘Europe in Question’ Discussion Paper Series*, 1-37 (2014).

<sup>11</sup> W. Abelshauser, *The Dynamics of German Industry: Germany’s Path toward the New Economy and the American Challenge* (New York: Berghahn, 2005); W. Abelshauser et al, ‘Kulturen der Weltwirtschaft’ 24 *Geschichte und Gesellschaft*, Sonderheft, (2012).

<sup>12</sup> W. Carlin and D. Soskice, ‘Reforms, Macroeconomic Policy and Fiscal Stabilization Policy’, in R. Schettkat and J. Langkau eds, *Economic Policy Proposals for Germany and Europe* (London: Routledge, 2012) 72-119; C. Crouch and W. Streeck, *Modern Capitalism or Modern Capitalisms?* (London: Pinter, 1995).

organizational networks, in standardization processes and in inter-corporate industrial associations – institutional divergences have rather more increased than decreased.<sup>13</sup> This drifting-apart of production regimes means that despite the world-wide victory-march of capitalism since the dual-division of the economic constitution of the cold war, a variety of diverging economic constitutions have established themselves.

Production regimes are institutional framework conditions for economic activity.<sup>14</sup> They structure the production of goods and services by way of markets and market-related institutions. The ‘rules of the game’ of economic activities, more exactly the incentives and constraints of economic transactions will be formulated through an ensemble of institutions, in which economic activities are embedded. The marked idiosyncrasy of each such production regime is explained by theory: the individual institutions within an economic area no longer exist by themselves, but with each other form interdependent elements of a stable system. The single institutions – enterprise financing, managerial education, contractual relationships between enterprises, inter-organizational networks, standardization processes, and inter-enterprise conflict regulation together form an interlocked system which tends toward self-regulation.

Within this stable system, institutions interact via the strategies of collective actors. That the differences in the regimes over the run of time become more accentuated can be derived back from the fact that they conclude in specific stable configurations, which create institutional advantages in the relevant production regime within international competition. Variants of capitalism are thereby explicable from the inter-systemic dynamic of the production regimes.<sup>15</sup>

<sup>13</sup> D. Soskice, ‘Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s’, in H. Kitschelt et al eds, *Continuity and Change in Contemporary Capitalism* (Cambridge: Cambridge University Press, 1997), 271-289.

<sup>14</sup> On the different production regimes as stable national or regional configurations of economy, politics, and law which are responsible for the varieties of capitalism, see P.A. Hall and D. Soskice, n 10 above.

<sup>15</sup> P.A. Hall, ‘The Political Economy of Europe in an Era of Interdependence’, in H. Kitschelt et al eds, *Continuity and Change in Contemporary Capitalism* (Cambridge: Cambridge University Press, 1997), 135-163.

### III. On the Concept of a Transnational Economic Constitution

The autonomization of various production regimes sets the scene for reconceptualizing the economic constitution. For this our protagonists, Sinzheimer as much as Böhm, produced relevant preparatory works. For both do not satisfy themselves with a concept of the economic constitution which – as is even today so often presented in constitutional law – equates it with the rather meager number of norms regulating the economy within the state constitution and then ends with the thesis of the neutrality of the German Fundamental Law on matters of economic policy. Both authors made it clear that such a state-centered concept simply fails to account for the actual dynamic of economic constitutions. Moreover, both authors set themselves in clear opposition to the Kelsenian tradition in which one would define an economic constitution simply as a formal hierarchy of economic norms. It is to Sinzheimer's and Böhm's historical merit that they constructed the economic constitution as a legal concept beyond both a state-centered constitutional concept as well as beyond a mere formal legal hierarchy of norms.

Franz Böhm identifies in his famous 'Private Law Society' not 'a gathering of millions of unconnected individuals, but intends an 'ordo': a free-standing social ordering, which established itself after the French revolution, equally ranked alongside the political constitution of the state as the autonomous constitution of the economy.<sup>16</sup> It has at its disposal institutions of its own: in addition to property, contract, and monetary system, the decentralized decision-making mechanism of market price and competition. Thus it creates a social ordering principle of its own, which corresponds to political representation in the state, the economic constitution in the legal sense. This autonomous order of social-steering and coordinating instruments is transformed into a genuine constitution of the economy as soon as it is stabilized by legal rules. Alongside such constitutive rules, this ordo-liberal constitution contains limiting rules, which are supposed to protect the economy against its self-

<sup>16</sup> F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' 17 *Ordo*, 75-151, 113 (1966).

destructive tendencies. It is decisive that these legal norms cannot be conceived apart from the social order; rather, one must grasp the economic constitution as an inseparable relation between legal order and social ordering.<sup>17</sup>

Hugo Sinzheimer, in his turn, understands the labor constitution as autonomous on an entirely different social basis, namely as ‘a legal order for itself, whose rules are not strewn throughout the various fields of civil and public law, but rather rest on their own basis’.<sup>18</sup> The decisive impulse for this ‘own basis’ is that social groups, paradigmatically in collective labor contracts, but also in group negotiations in other contexts, are enacting an autonomous law in the strict sense, which exists alongside the law of the state. Coalitions, that is labor unions and employer associations, work together as collective actors on such a democratic labor constitution. The legal system supports the autonomy of the labor constitution in the same ways as it supports the state constitution. Moreover, Sinzheimer, who introduced elements of economic democracy into the Weimar constitution, suggested the concept of an autonomous ‘economic community’ (*Gemeinwesen der Wirtschaft*), which parallel to the political community presents its ‘own economic constitution alongside the state constitution’,<sup>19</sup> in which the ‘economic citizens’ play their own roles alongside the citizens of the state.<sup>20</sup>

It is evident that they base their concept of economic constitution on real existing production regimes, but they do so on different elements, Böhm on market structures and competitive processes,

<sup>17</sup> For thorough analyses of Franz Böhm’s life and work, R. Wiethölter, ‘Franz Böhm (1895-1977)’, in B. Diestelkamp and M. Stolleis eds, *Juristen an der Universität Frankfurt am Main* (Baden-Baden: Nomos, 1989), 208-252.

<sup>18</sup> H. Sinzheimer, ‘Das Wesen des Arbeitsrechts’, in O. Kahn-Freund and T. Ramm eds, *Arbeitsrecht und Rechtssoziologie* (Frankfurt: Europäische Verlagsanstalt, 1976 (1927)), 108-114, 108.

<sup>19</sup> H. Sinzheimer, *Das Räteystem: Zwei Vorträge zur Einführung in den Rätegedanken* (Frankfurt: Union Druckerei, 1994 (1919)), 18.

<sup>20</sup> H. Sinzheimer, *Krise des Arbeitsrechts*, 135, 140. For a thorough analysis of Sinzheimer’s works, see R. Dukes, ‘Hugo Sinzheimer and the Constitutional Function of Labour Law’, in G. Davidov and B. Langville eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), 57-68; A. Seifert, ‘«Von der Person zum Menschen im Recht»: Zum Begriff des sozialen Rechts bei Hugo Sinzheimer’ 2 *Soziales Recht*, 62-73 (2011).

Sinzheimer on formal organization of collective actors and their negotiation systems. Thus, despite all surely serious differences, one can describe both as early representatives of a 'societal constitutionalism', as is later formulated by the historian Reinhart Koselleck and by the sociologists Philipp Selznick and David Sciulli.<sup>21</sup>

We may draw three essential conceptual innovations from the Böhm and Sinzheimer bank account. They use the term economic constitution neither as a simple metaphor nor do they define it as a merely social-economic pre-legal ordering; instead, they place the economic constitution as an independent legal institution alongside the constitution of the state. The state constitution is for them only first among equals. That is their first innovation with regard to constitutional law, which recognizes no constitution beyond that of the State. Their second innovation is a constitutional concept in which the hierarchy of legal rules that regulates the economy is not counter-factually opposed to the actual organization of the economy; rather, legal rules are melded into a unity with the autonomous institutions of the economy. Their third innovation is that not only the state constitution but also the economic constitution contains constitutive rules, ie norms, which, in contrast to regulatory norms and decisional rules, do not merely regulate social realities, but literally create social realities. Market and money are – in order to address Neil MacCormick – 'institutional facts', which are produced in the first place by the rules of the economic constitution, or more exactly are co-produced by them.<sup>22</sup> The special role of constitutive rules places the economic constitution on the same level as the constitution of the state. With these three innovations our protagonists stand not only for a legal pluralism which identifies a corporative legal order alongside the law of the state and equally ranked to it. Moreover, they have founded a new constitutional pluralism, which understands the constitutive and limitative rules of

<sup>21</sup> R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford: Stanford University Press, 2002); P. Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969); D. Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxistic Critical Theory* (Cambridge: Cambridge University Press, 1992). It was Sciulli who coined the term 'societal constitutionalism'.

<sup>22</sup> N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Dordrecht: Kluwer, 1986).

social institutions as forming genuine legal constitutions alongside the constitution of the state.<sup>23</sup>

Thereby they have laid the foundations for a 'material' economic constitution. Briefly stated, this materiality describes, in contrast to a formal norm hierarchy, the momentum of 'double reflexivity'.<sup>24</sup> What does this mean? A constitution is not simply a legal phenomenon but an inseparable connection between constitutional law and social order, in which reflexive legal norms of the constitutional hierarchy are intertwined with reflexive processes of social practice. At the same time, in parallel to the state constitution there exists in the economic constitution a binary code, superior to the code of legal/illegal with values of 'consistent with the economic constitution'/'contrary to the economic constitution'. This has a remarkable hybrid character, because it tests economic law rules for their constitutionality on the one hand, and on the other hand tests economic transactions and organizations for their social responsibility. The economic constitution then would be understood as not merely a legal text, but rather as the complex interrelation of legal and economic basic institutions within a production regime.<sup>25</sup>

Now, if one looks at the global economy with the optical device by Sinzheimer and Böhm, then it becomes clear that the institutions of the Washington consensus are in no way able to produce a unitary global economic constitution. 1989 did signify the end of state socialism but was in no way the end of history. The result of the most recent globalization wave is instead an enormous diversity of variants of capitalism, a multitude of production regimes which for their part bring forth a variety of economic constitutions. China's state capitalism, better: its single party capitalist production regime, the

<sup>23</sup> The leading contemporary representative of constitutional pluralism is N. Walker, 'Taking Constitutionalism Beyond the State' 56 *Political Studies*, 519-543 (2008).

<sup>24</sup> See in detail, G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012), 102 et seq.

<sup>25</sup> On transnational societal constitutionalism, which lays at the bottom of such a conception of the transnational economic constitution, see the contributions by P. Kjaer, D. Wielsch and M. Renner, in G. Teubner and A. Beckers eds, '*Transnational Societal Constitutionalism*' 20 *Indiana Journal of Global Legal Studies*, 700 et seq, 907 et seq, 941 et seq (2013).

*keiretsu* dominated economic constitution of Japan, the post-colonial production regimes of South America are today serious rivals to the established economic constitutions in the western hemisphere.<sup>26</sup>

It is however decisive that the variants within capitalism, which counter-indicate a unitary global economic constitution, do not somehow bring with them a mere re-nationalization of economic constitutions. Globalization could not develop a unitary economic constitution but, inexorably, has demolished national boundaries of the economy and established production regimes as the new substrates of the economic constitution, without regard to their territorial boundaries.<sup>27</sup> However, even the new regional units, the EU, NAFTA, or MERCOSUR, do not define the boundaries of the new production regimes. The European Union is cut through in three ways by the boundaries of different production regimes.<sup>28</sup> It is particularly since 2008 that Northern Europe, England, and Southern Europe are drifting apart in their different production regimes, despite their efforts toward European unification. And in the case of Italy, two different production regimes collide, even on the territory of one nation-state.

Of course the production regimes have their historical sources in the old unity of nation-state and national economy. However, with the dominance of transnational enterprises and their subsidiaries, with the globalization of markets and their differentiation into various branches, this unity has been broken. The production regimes have expanded forth beyond their territorial state borders. This ends in an assembly of different economic constitutions, which are difficult at best to sort out, and which overlap in their areas of validity. In principle a single production regime will be shaped by differing local power centers: the autonomous rule production in de-territorialized transnational enterprises, the domination of only one

<sup>26</sup> See n 10 above et seq.

<sup>27</sup> Economic cultures do not correspond to nation-state borders, see eg W. Abelshauser, n 11 above.

<sup>28</sup> Ibid; A. Regan, 'Political Tensions in Euro-Varieties of Capitalism: The Fiscal Crisis of the Democratic State in Europe' *EUI Working Paper MWP 2013/24*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2269668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269668) (last visited 15 October 2015).

economic culture in individual branches of the global economy, and the regulations of the individual nation states. This results in a complex situation, typical for transnational relations. Faced with intersecting boundaries of economic cultures that exist in multinational corporations, in contractual regulations of supply and distribution networks, in different industries in world markets, and in national regulatory regimes – a high functional specification coincides with the simultaneous overlapping of different systems of norms. The individual production regimes maintain their identity against the global economic institutions in their ‘persistence, transnational hybridization, and path dependency.’<sup>29</sup> The literature on transnational law established the expression ‘inter-legality’ which dissolves clearly divided areas of validity of territorial legal orders in favor of their interpenetration.<sup>30</sup> The economic constitutions of different regimes of production claim – one should say: in a relationship of ‘inter-constitutionality’ – validity in a given time and place, while they at the same time are mutually influencing each other. Backer correctly designates with these four marking characteristics the current global constitutional (dis)order as ‘fracture, fluidity, permeability, polycentricity’.<sup>31</sup> Therefore one should not speak of a global, but rather of a transnational economic constitution, insofar as global stands for the unity of a world constitution and transnational for the multipolarity of mutually interwoven economic constitutions. The existing transnational economic constitution must thus – in its multi-polarity of various production regimes on the one hand and the global economic institutions on the other – be grasped with greater complexity than the simple unity of a global economic constitution or the simple adjacent constitutions of national economies. The layering of their unity-in-diversity is in all cases to be grasped as a ‘collision

<sup>29</sup> W. Abelshauser, n 11 above, 19.

<sup>30</sup> S. Boaventura de Sousa, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Evanston: Northwestern University Press, 2003), 437; M. Amstutz and V. Karavas, ‘Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum’ 8 *Rechtsgeschichte*, 14-32 (2006).

<sup>31</sup> L. Catá Backer, ‘The Structure Of Global Law: Fracture, Fluidity, Permeability, And Polycentricity’ 7 *Working Papers Consortium for Peace and Ethics*, 106 et seq (2012), available at <http://ssrn.com/abstract=2091456> (last visited 15 October 2015).

constitution', that is as a meta-constitution of the conflicts between different regimes of production.

Contrary to the still dominant doctrine, which considers the economic constitution as a sub-region of the state constitution, the economic constitution under transnational conditions is to be understood as a two-level complex:

(1) on the lower level as an independent source of constitutional principles, ie as the summation of the sectoral constitutions of different production regimes,

(2) on the meta-level as a collision constitution, which establishes itself in the collisions between

(a) constitutions of different production regimes,

(b) different sectoral constitutions (constitutions of the state, the economy, the media, science etc) and

(c) global regime constitutions and production regime constitutions.<sup>32</sup>

In view of this complexity, the collisions do not resolve themselves through either federal principles or international private law principles.<sup>33</sup> The responsibility for resolving the conflicting constitutions cannot be found in the global institutions as hierarchically superior meta-instances. The role of a third instance in conflicts within plural constitutions, which Böhm and Sinzheimer still could accord to the nation state, is absent under conditions of globalization. The reason is – as Niklas Luhmann says, 'the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society.'<sup>34</sup> Instead, the rules to regulate collisions of the economic constitutions – just as paradoxical as it is in international private law

<sup>32</sup> J. Bomhoff, 'The Constitution of the Conflict of Law', in H. Muir Watt and D.P. Fernandez Arroyo eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015), 262- 276; J. Bomhoff and A.C. Meuwese, 'The Meta-Regulation of Transnational Private Regulation' 38 *Journal of Law and Society*, 138-162 (2011).

<sup>33</sup> Inspired by C. Joerges, 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation', in C. Joerges and J. Falke eds, *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011), 465-501.

<sup>34</sup> N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 488.

– will be developed in the conflicting constitutions themselves. At the same time however its demands exceed the capacities of international private law by far. For the production regimes and the global institutions together represent a multilevel governance complex, which produces many more collisions, even between the different levels, which the decentralized collisions calculus needs to take into account in each and any economic constitutional unit.

The simple ‘horizontal’ view of international private law cannot achieve that, but neither will, however strange it sounds, hierarchical methods do the job. It is a matter of a strict heterarchical relation between economic constitutions, even between global institutions and individual production regimes. The individual production regimes on the one side and the global economic institutions on the other are the power centers of collisions which define the main lines of the constitutional conflicts. The collisions among economic constitutions are thus to be solved in the conflicts of law rules of each production regime and also of each global institution:

- *horizontally*, within the diversity of production regimes, whose borders are no longer territorial but can only be grasped functionally,
- *vertically*, in the relationship between these production regimes and the global institutions of the world economy,
- *diagonally*, as the collision between a specialized globalized regime and the corresponding specialized particular subject-matter of an individual regime of production.

This situation resembles network structures:<sup>35</sup> it is a matter of a heterarchical relationship between the various semi-autonomous levels of multi-level governance, for which network theory provides an appropriate conceptualization. Networks as a specific combination of bilateral individual relationships and multilateral overarching connectivity result from a fragile coexistence of various network nodes – global institutions and individual production regimes – whose normative orders contradict each other. Networks provide an institutional answer to the conflict of rationalities, which result from the differentiation of autonomous systems. Thus arises a ‘structure of

<sup>35</sup> On the following particularities of networks with further references, see G. Teubner, ‘«And if I by Beelzebub Cast out Devils,...»: An Essay on the Diabolics of Network Failure’ 10 *German Law Journal*, 115-136 (2009); Id, *Networks as Connected Contracts* (Oxford: Hart, 2011), 122 et seq.

paradox' of institutional interweaving, because these institutions rest on 'contradictory demands' which are at the same time 'functional'.<sup>36</sup> Networks translate external contradictions, which manifest in conflicts of norms, into the internal perspective of the individual nodes, which maps them in the internal connections of different levels and subsystems, of network nodes, node relationships and the whole network.<sup>37</sup> In terms of collision law this means that the network nodes, thus the regimes of production as well as the global institutions, each develop their own internal collision law, from which perspective norm conflicts are decided.

Network theory describes the multi-polarity of the transnational economic constitution as a decentralized network, whose core is – in contrast to a hierarchical organization – only first among equals.<sup>38</sup> In case of collisions between the economic constitutions there is no center on which to refer, but rather – quite analogous to international private law – only the network nodes themselves. Thus, each individual economic constitution, itself decides decentrally about norm collisions. Each network node then stands in responsibility, because it must take up both its internal perspective as well as the norms of the other network nodes and of the entire order. Transnational *order public* can only be decided decentrally in the internal perspective of each individual economic constitution.<sup>39</sup>

#### **IV. The Constitutional Alternatives in the Western Production Regimes**

What do the collisions of production regimes in the transatlantic area look like?

<sup>36</sup> So for regional policy networks, see A. Benz, 'Regionalpolitik zwischen Netzwerkbildung und Institutionalisierung: Zur Funktionalität paradoxer Strukturen' 1 *Staatwissenschaften und Staatspraxis*, 23-43, 24 (1996).

<sup>37</sup> K. Semlinger, 'Effizienz und Autonomie in Zulieferungsnetzwerken: Zum strategischen Gehalt von Kooperation', in W.H. Staehle and J. Sydow eds, *Managementforschung* (Berlin: De Gruyter, 1993), III, 309-354, 332.

<sup>38</sup> For details, see A. Windeler, *Unternehmensnetzwerke: Konstitution und Strukturation* (Wiesbaden: Westdeutscher Verlag, 2001), 105 et seq.

<sup>39</sup> Karl-Heinz Ladeur particularly emphasizes these points in 'Die Netzwerke des Rechts?', in M. Bommers and V. Tacke eds, *Netzwerke in der funktional differenzierten Gesellschaft* (Wiesbaden: Springer VS, 2011), 143-171, 163 et seq.

At first glance, it appears that in the western hemisphere a counter-trend has developed, in which the European and American production regimes are more and more converging. The liberalization of world trade, the end of the trade restrictions of the East-West conflict, and falling transport and information costs unleashed adaptation pressures upon the European welfare states, which were widely understood as having no alternative.<sup>40</sup> In the last forty years the traditional corporate production regimes of continental Europe have been increasingly dismantled and they approached ever more strongly the Anglo-American production regime.

From co-determination, to bank participation in enterprises up to the triangular cooperation of enterprise associations, labor unions, and government, the neo-corporatist institutions ran into pressure. Not only economists critical of neo-corporatism, but even Wolfgang Streeck, the most important theoretician and sympathizer of European post-war corporatism predicted that the democratic elements of the European production regime would not survive the recent wave of globalization.<sup>41</sup> The necessary fine-tuning between social organizations and political institutions would be unable to be repeated on a global scale and the amount of mutual trust and socio-cultural consensus, which here was a precondition, could not be globalized. Already at the European level, where institutions of ‘social dialogue’ between the European Commission, the Confederation of European Trade Unions, and the European Economic Associations have been experimented with, an expansion of the neo-corporatist model beyond the nation-state proved to be of little success. On a global scale, however, neo-corporatist arrangements would fail completely due to an inherent contradiction. The self-reproduction of social systems on global paths would become derailed since only national institutions are available for their political-legal constitutionalization. Franz Böhm’s massive criticism of Sinzheimer’s vision of economic democracy and co-determination appears to be historically confirmed.<sup>42</sup>

<sup>40</sup> W. Abelshauser, n 11 above, 10 et seq.

<sup>41</sup> W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford: Oxford University Press, 2009), 260 et seq; Id, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London: Verso, 2014).

<sup>42</sup> Very critical: F. Böhm, ‘Das wirtschaftliche Mitbestimmungsrecht der Arbeiter

However, the most recent recovery of democratic corporatism in continental Europe comes as a surprise. Already with the transition from standardized mass production to post-Fordist diversified quality production in the eighties, then since the middle of the nineties with the decentralization of collective bargaining on the enterprise level, at latest, with the intensive cooperation between enterprise associations, trade unions, and government during the economic crisis of 2008-09, a transformation of post-war corporatism took place, which proves its resilience despite globalization and economic crisis.<sup>43</sup> The transformation particularly took place in the power relations within the corporate triangles at the macro, meso, and micro levels.<sup>44</sup> The center of power has notably shifted to the 'producer coalitions' on the enterprise level, while they were supported in the background by the cooperation of the industry associations, sectorial trade-unions, and governmental instances, which guarantee higher productivity and prevention of crises. Empirical investigations show that not so much the government's Agenda 2010 gave the impulse for success, but above all the intensive cooperation between enterprises and works-councils, which were supported by labor-unions, industry associations, and government alike. The economic and social success of democratic corporatism in comparison to the production regimes of England and the USA has been so impressive, that the American Nobel prize winner Stiglitz recommended the Scandinavian or German way as a model for the USA.<sup>45</sup>

im Betrieb? *Ordo*, 21-250 (1951). Rather differently, Id, 'Mitbestimmung als Gleichberechtigung von Kapital und Arbeit oder als Vertragsanspruch der Arbeitnehmer aus dem Arbeitsverhältnis?', in F. Böhm and G. Briefs eds, *Mitbestimmung – Ordnungselement oder politischer Kompromiss* (Stuttgart: Seewald, 1971), 206 et seq.

<sup>43</sup> With rich empirical material, see C. Wendy et al, 'The Transformation of the German Social Model', in A. Martin and J.E. Dolvik eds, *European Social Models in the Face of Global Economic Crisis* (Oxford: Oxford University Press, 2014), 49-104; C. Dustmann et al, 'From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy' 28 *Journal of Economic Perspectives*, 167-188 (2014).

<sup>44</sup> The Swedish model of corporatism has not been done away with in this phase but rather has been transformed and adapted to the conditions of globalization, see in detail G. Flume, 'Das Modell Schweden: Kontinuität und Wandel einer Wirtschaftskultur', in W. Abelshauser et al eds, *Kulturen der Weltwirtschaft* (Göttingen: Vandenhoeck & Ruprecht, 2012), 114-133.

<sup>45</sup> J. Stiglitz, 'Deutschland muss mehr tun', Spiegel-Online 2 April 2009. Similar

Against all previsions of the collapse of social corporatism and economic democracy, varieties of capitalism have established themselves in the transatlantic space as a result of globalization, in which the resistance of European economic cultures against the worldwide successful praxis of standard capitalism is definitely notable. The economic constitutions of Scandinavian and Rhine capitalism are characterized by massive welfare state regulations, the participation of strong labor unions, and the coordination by tightly woven neo-corporatist organizations. It is particularly in their economic democratic elements that they differ markedly from the liberal finance-capital dominated economic constitutions of Anglo American minting, which rely for their coordination above all on markets and hierarchically organized enterprises. After the economic crises 2008, for many observers the neo-corporatist arrangements appear today on the basis of their historical comparative advantage, in view of their higher productivity and their increased social legitimacy, as the more attractive production regime.

Collisions between economic constitutions can be traced back to these significant differences between the two great production regimes – the European production regimes (mainly Germany, Sweden, Norway, Finland, Netherlands, Switzerland, Austria) on the one hand and the Anglo-Saxon regimes of liberal market economies (Britain, USA, Ireland, Canada, Australia, New Zealand) on the other. The Anglo-American economic culture forms a group, styled as Liberal Market Economies (LME) of relatively unregulated liberal market economies. In contrast to the European markets, with stronger economic democratic and social welfare state orientations – so-called Coordinated Market Economies (CME) in which neo-corporatist negotiating arrangements between economic associations, trade unions, and the government coordinate the economy – industry associations and labor unions in the Anglo-American area are rather weak and play only a very limited role of coordination in the institutional framework.<sup>46</sup> Instead, we find there a relatively uncoordinated co-existence of free market processes on the one hand and external regulation by the government on the other

suggestions are even made in Great Britain, 'Labour's Economic plans: Departmental Determinism', *The Economist* 1 January 2014.

<sup>46</sup> P.A. Hall and D. Soskice, n 10 above.

hand. There, the government, regulatory authorities, and the courts play the most important role in the formation of regulations, whereby the rules typically include little margin of appreciation.

The contrast between the Anglo-American LME and the European CME is the constitutional alternative today, which has replaced the former difference between Böhm's ordo-liberal economic constitution and Sinzheimer's social democratic economic democracy. Böhm's visions have left but few traces in both production regimes, while the European neo-corporatist constitutions definitively implemented some of Sinzheimer's visions of economic democracy.<sup>47</sup> Although Sinzheimer's rather centralistic ideas of an 'economic community', of council workers' democracy and the organized cooperation of coalitions were never realized, today's social corporatism has nevertheless constructed impressive institutions of economic democracy. There is one important difference from Sinzheimer's vision: on the macro and meso levels the current neo-corporatist negotiation system is not formally institutionalized by organizations of public law. Instead, on these levels a rather informal corporatism has arisen by accretion. Meanwhile, on the micro level a strongly formalized corporatism by way of board-codetermination and shop-floor works' councils dominates. Sinzheimer's council workers' organizations were never made real, but a functional equivalent for shifting political conflicts into the economic and social areas can be observed, in which today spontaneous protest movements and non-governmental organizations move to the foreground.

The collisions of economic constitutions fall into the following economic cultural differences of the two production systems:<sup>48</sup>

1. While in the Anglo-American economic culture, financial systems put a relatively short-term horizon on enterprises, which at the same time carry with them high risks, the neo-corporatist culture

<sup>47</sup> Likewise A. Seifert, n 20 above.

<sup>48</sup> For penetrating analyses of the differences, see: R. Deeg, 'The Rise of Internal Capitalist Diversity? Changing Patterns of Finance and Corporate Governance in Europe' 38 *Economy and Society*, 552-579 (2009); A. Johnston and B. Hancké, 'Wage Inflation and Labour Unions in EMU' 16 *Journal of European Public Policy*, 601-622 (2009); P.A. Hall and D. Soskice, n 10 above.

favors financial modes of enterprises toward a rather more long-term financing.

2. In the Anglo-American economies the extreme deregulation of the labor market has driven out collective labor law, which denies worker interests an effective representation in enterprises. There exist only weak trade unions, which can hardly oppose the hierarchical leadership of top management. In contrast, in the neo-corporatist culture, institutions of economic democracy have been developed which articulate worker interests quite successfully. In the collective labor relations of enterprises and of industry, strong cooperative relationships have arisen, in which trade unions and today ever more often the shop-floor works' councils play an important role and are responsible for the formation of successful production coalitions on the global market.

3. While in the LMEs the system of inter-enterprise relations places highly competitive demands and at the same time sets sharp boundaries on potential cooperation between enterprises, the relationships between enterprises tend in CMEs to develop cooperative networks with relational long-term contracts, and these both horizontally within the market as well as vertically between producers, transporters, and sales.

4. The coordination between the economic sector, the political and other sectors of society will in LMEs be left either to market forces or exclusively to state regulation. In contrast, CMEs have developed neo-corporatist negotiation arrangements in which enterprises cooperate with welfare state regulatory institutions and various social organizations. Economic associations and large enterprises coordinate markets by the development of technical standards, standard contracts, and procedures of dispute settlement. Economic associations negotiate technical and social standards with the government. The courts produce social obligations for economic enterprises. Thus, a negotiated *ordre public économique* is constructed.

#### **IV. An Example: Corporate Codes in the Collisions of Transnational Economic Constitutions**

How the collisions between diverging production regimes lead global economic institutions to develop in entirely different

directions shall be sketched in this conclusion with an example of global corporate constitutionalism – the corporate codes of multinational enterprises.<sup>49</sup> Multinational corporations were involved in recent years in a series of scandals which shocked global public opinion. Ecological catastrophes, inhumane working conditions, child labor, ‘complicity’ of multinational enterprises in cases of corruption and human rights violations by political regimes have raised public awareness of the negative consequences of the transnationalization of economic enterprises. Binding regulations under international law could not be implemented. Instead, a massive amount of another species of transnational norms has splayed itself across the global legal landscape – corporate codes of conduct. These are ‘voluntary’ codes of behavior for multinational corporations.

Two different basic variations of the codes have been formed. On the one side, the global economic institutions of the state world – the UN, OECD, ILO, EU – have formulated unitary ‘public’ codes of behavior for enterprises. On the other, the massive public criticism, which is diffused by the media globally as well as by the offensive actions of protest movements and non-governmental compels countless corporations to ‘voluntarily’ take up a number of ‘private’ corporate codes which posit norms in which they make effective self-binding declarations to the public and promise their implementation.

In the relationship of codes, an inversion has occurred of the traditional hierarchy of superior state-law and subordinate private law norms.<sup>50</sup> A particularly evident reversal is found in the hard-law / soft-law quality of ‘public’ and ‘private’ codes. It is now the rules based on state law providing only non-binding recommendations

<sup>49</sup> On the transnationalization of multinational corporate group charters, see L. Catá Backer, ‘The Concept of Constitutionalization and the Multi-Corporate Enterprise in the 21st Century’ 6 *Working Papers Coalition for Peace & Ethics*, 1-27 (2014); Id, ‘Governance Without Government’ n 6 above; G. Teubner, ‘Self-constitutionalization of Transnational Corporations? On the Linkage of ‘Private’ and ‘Public’ Corporate Codes of Conduct’ 19 *Indiana Journal of Global Legal Studies*, 617-638 (2012).

<sup>50</sup> On the relationship between both types of codes, see L. Catá Backer, ‘Governance Without Government’ n 6 above.

that display the quality of 'soft law', while the private ordering of multinational corporations effectively implements precise, binding norms, and thereby develops into a new form of 'hard law'.

As a consequence of this inversion, the constitutionalization of the transnational economy essentially occurs in the corporate sector, via the formation and implementation of private ordering. Not the institutions of the state, but rather corporate collective actors decide whether corporate codes will be at all produced, and if so which content they will have and how they are to be legally enforced. As a result of drastic power transfers in the global economy from the public to the corporate sector, transnational enterprises have become the real constitutional authority, because it is they who create corporate codes through their unilateral public declarations of self-obligation.

Due to the collisions between diverse production regimes, the character of corporate codes itself is incisively changed. In the vertical dimension, it is the varieties of capitalism that successfully hinder the global institutions of the world of states – UNO, ILO, OECD, EU – from providing legally binding corporate codes. If the economic constitutions of the major production regimes in this way diverge, then the 'public' corporate codes can only be soft law, while the hard law can emerge only at the level of enterprises in the 'private' codes. The 'public' codes can no longer regulate the collisions for a global *ordre public économique*, but only give guidelines for concrete collision rules, which are implemented in the enterprises according to the specifics of the situation.

In the horizontal dimension, the 'private' codes take on a different character, depending upon the production regime they are implemented in. This is due not primarily to their adaptation to local particularities of the individual enterprise, but rather to their institutional embedding in different regimes of production. They will differ from each other according to whether they operate in LMEs with their compromise between Keynesianism and the Chicago School, with their priority to private ordering, adapted to the New Sovereignty of enterprises, or in CMEs with greater welfare state and economic democracy components in the neo-corporatist triangle of associations, trade unions, and the state.

That shows itself in the current virulent question whether the state courts qualify corporate codes as legally binding and enforce

them effectively.<sup>51</sup> Multinational corporations seek by any means to hinder the interpretation and application of corporate codes by state courts. Thus they insist categorically that their codes are ‘voluntary’ and therefore legally non-binding. American courts hesitate when public interest litigation pushes them to enforce the codes as legally binding rules. They are open only to juridify market-based social norms. They declare other social norms as legally binding only insofar as they implement consumer preferences where these are sabotaged by false or misleading information. However, with an appeal to judicial restraint, they deny the binding character to the core material of the corporate codes, ie social norms, which proscribe corporate behavior in the name of the public interest.<sup>52</sup>

The chances for juridifying corporate codes appear quite different in the European production regime. If they are imported into the thoroughly regulated neo-corporatist arrangements, then the codes must be adapted to fundamental principles of the welfare state and economic democracy. They will be exposed to the stronger legislative activities in the EU and at the same time to a more extensive juridification by the courts. For example, the EU-legislator provides sanctions in § 5 I No 6 of the Law Against Unfair Competition against enterprises that give false data about the observation of a code of conduct, to which the enterprise has obligated itself in a binding fashion, if said false data refers to that binding code.<sup>53</sup>

Juridification by the courts, with which the legal qualification of the corporate codes enters into new found land, runs in two opposing directions. On the one side, the courts exert strict control of the contents of the codes, in so far as the codes burden employees or

<sup>51</sup> For detailed analyses, see A. Beckers, *Taking Corporate Codes Seriously: Towards Private Law Enforcement of Voluntary Corporate Social Responsibility Codes* (Oxford: Hart, 2015); D. Klösel, *Compliance-Richtlinien: Zum Funktionswandel des Zivilrechts im Gewährleistungsstaat* (Baden-Baden: Nomos, 2012).

<sup>52</sup> On these three types of norms in US law, see A. Peukert, ‘Die Rechtsrelevanz der Sittlichkeit der Wirtschaft – am Beispiel der Corporate Social Responsibility im US-Recht’, in R.M. Hilty and F. Henning-Bodewig eds, *Corporate Social Responsibility* (Berlin: Springer, 2014), 233-256.

<sup>53</sup> The particularities under which the specific codes of conduct fall within the norm are controversial and courts have not finally clarified their scope, A. Beckers, n 51 above, 176 et seq.

consumers; on the other side, the courts transform the codes into binding state law, in so far as they contain obligations in the public interest.

The courts intervene effectively in two constellations, where the enterprises insist on the legally non-binding character of their voluntary codes. In the first constellation they intervene when enterprises wish to remove private compliance rules from judicial control since they want to more strictly implement their internal rules – like in the cases of rules on whistle-blowers, social political activities, internal monitoring, evaluations of performance, and internal supervision of rules. The case of Walmart is the most famous. Walmart was very strict in its corporate codes, governing even the private lives of the employees, and sought to enforce a clause prohibiting love and flirtation, which is standard in the USA. The courts, however, refused to permit Walmart to appeal to the non-binding nature of the voluntary code which would allow them to escape from judicial review. The courts let the questionable clauses fail, in part based on the participation rights of the works council, in part on the basis of fundamental rights standards.<sup>54</sup>

In the second constellation the case of Lidl, which has become just as famous, shows how difficult it is for the enterprises to appeal to the ‘voluntary’ and non-binding character of their codes, whenever they declare self-obligations with respect to the public good but then in practice do not hold to them.<sup>55</sup> Lidl was sued, with success, for anti-competitive conduct when it made false advertisements and declared that it had fulfilled its code obligations.

Not only competition law but also tort law with its highly developed organizational duties, as well as contract law, with its broad contractual and quasi-contractual obligations, and the third party effect of fundamental rights are relevant here. With these doctrines the welfare-state-inspired private law of continental Europe has a full toolkit for the legal qualification of corporate codes

<sup>54</sup> Arbeitsgericht Wuppertal NZA-RR 2005, 476; Landesarbeitsgericht Düsseldorf NZA-RR 2006, 81. D. Klösel, n 51 above, 59 et seq.

<sup>55</sup> An extensive analysis of the Lidl case: Verbraucherzentrale (Statement of Claim filed 6 April 2010, Case settled on 14 April 2010), *Hamburg v Lidl*, available at <http://business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh> (last visited 15 October 2015).

at its disposal.<sup>56</sup> Thereby the courts can assure the legally binding character of the codes and enable their enforcement and judicial review. Courts can in the final analysis always accuse enterprises of *venire contra factum proprium* – a legally relevant performative self-contradiction, when enterprises have first enacted corporate codes as serious declarations of self-binding, but then seek to qualify them before the court as non-binding declaratory intentions: estoppel.

As for aspirations to economic democracy, the US courts prove themselves to be rather resistant. Democracy there is understood as having no place in market processes, but primarily in the political system. Corporate codes are accordingly strictly interpreted for conformity to the market.<sup>57</sup> They are only juridified by courts insofar as they implement the changing preferences of market participants in the market. Primarily, it remains a matter for the private TNCs to react *ad hoc* in their struggles with civil society groups regarding the changing preferences of consumers and investors by public interest oriented codes, so far as this corresponds to their cost-benefit analysis. A further politicization of the marketplace is not held to be legitimate there.

In contrast, the economic cultures of continental Europe with their neo-corporatist institutions have historically been long directed toward an internal politicization of economic decisions. Alongside wide ranging social welfare state interventions, the institutions of economic democracy are particularly held to be legitimate for they, through the participation of labor in corporate decisions, are supposed to compensate for market failures.<sup>58</sup> In their adaptation to democratic corporatism of continental Europe, the corporate codes are being redefined: no longer seen as unilateral enactment by sovereign enterprises, they are instead understood as the result of political conflicts between enterprises and civil society actors. In addition to other institutions of economic democracy, corporate codes serve here to pursue goals of public interest, the re-embedding of the economy into society. That occurs however not through

<sup>56</sup> The current state of play and suggestions for further legal reforms can be seen in A. Beckers, n 51 above, 39 et seq, 344 et seq.

<sup>57</sup> Thereto see A. Peukert, n 52 above.

<sup>58</sup> In a historic perspective, see W. Abelshauser, n 11 above.

external state intervention but rather in the form of a re-entry: the internalization of social demands in the decisions of the enterprise.<sup>59</sup>

If the internal politicization of the European economic culture has thus markedly influenced the corporate codes, the codes in their turn produce new impulses for economic democracy.<sup>60</sup> Their first impulse comes from a change in direction of the protest movements, in which according to some observers a new political quality in society has been realized.<sup>61</sup> Civil society protests direct themselves increasingly not (only) against institutions of the state, but selectively, directly, and intentionally, against corporate actors in the market, which are accused of violating their social responsibilities. Social movements react thereby to drastic power shifts in the global economic constitution. The actual economic *pouvoir constituant* has been taken over by transnational enterprises, because it is they who, through unilateral public self-obligation, enact and implement the corporate codes. However, first and above it is social movements who by their protest initiate these corporate codes, co-determine their contents, and monitor their implementation. For it is mostly the NGOs and other actors in civil society who have compelled multinational corporations to conclude agreements with them regarding corporate codes through their protest actions. Civil society's actors realize a particular potential of corporate codes for economic democracy through their activities, which go well beyond the traditional neo-corporatist arrangements, which in continental Europe were only developed between enterprises and labor unions.

Their second impulse for economic democracy drastically extends the substantive themes within the politicization of the economy. Corporate codes no longer only mediate the distributive interests of capital and labor within the enterprise. The civil society protests go

<sup>59</sup> For details see G. Teubner, 'Self-constitutionalization of Transnational Corporations?' n 49 above.

<sup>60</sup> The consequences which result from such new institutions in international law are researched by I. Feichtner, 'Verteilung in Völkerrecht und Völkerrechtswissenschaft', in S. Boysen, A.B. Kaiser and F. Meinel eds, *Verfassung und Verteilung* (Tübingen: Mohr Siebeck, 2015).

<sup>61</sup> C. Crouch, *The Strange Non-Death of Neoliberalism* (Cambridge: Polity Press, 2011); R. O'Brien et al, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2002), 2.

much further than these important but limited themes, and compel corporations to establish encompassing public interests with binding force: environmental protection, anti-discrimination, human rights, product quality, consumer protection, data protection, freedom of the internet, and fair trade.<sup>62</sup> While such themes had been earlier almost exclusively decided within the political system, a strange paradox of economic democracy arises as a result of direct confrontation of civil society groups with corporations: the public interest will be implemented through private ordering.<sup>63</sup> Of course the corporate codes cannot, like political legislation, claim universal validity. However, for the individual enterprise they have binding obligatory force; for the civil society groups insist that the power of corporate law arrangements extends to dependent corporations, and that contractual agreements bind large networks of supply and distribution.

Their third impulse for economic democracy proceeds from the self-obligation of enterprises to protect fundamental rights. Here, the codes go much further than the current doctrines of third-party effect of fundamental rights. For they break through their state-fixation and recognize explicitly a direct effect of fundamental rights on private collective actors. They also make up for certain weaknesses of the state-law protective duties. If the fundamental rights standards of the codes result directly from the democratic potential of social conflicts, then a higher contextual adequacy is to be expected because organizations and procedures are more exactly calibrated to the particularities of the fundamental rights conflicts in economic relations.<sup>64</sup>

<sup>62</sup> Luhmann argues that the so-styled 'new social movements' no longer fit the form of socialist protest. They do not refer to the consequences of industrialization and no longer have the sole goal of a better division of wealth and well being. Their propositions and themes have become much more heterogenous, above all the ecological them has crept into the foreground, N. Luhmann, *Theory of Society* (Stanford: Stanford University Press, 2012), chapter 4, XV.

<sup>63</sup> For a thorough analysis, A. Beckers, n 51 above, 262 et seq.

<sup>64</sup> On such an extension of the third party effect of fundamental rights, see I. Hensel and G. Teubner, 'Horizontal Fundamental Rights as Collision Rules: How Transnational Pharma Groups Manipulate Scientific Publications', in B. Kerstin et al eds, *Contested Collisions: Interdisciplinary Inquiries into Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2015).

## V. Conclusion

Globalization has indeed produced a transnational economic constitution. However, it needs to be understood as a meta-constitution, which regulates constitutional collisions. The colliding units are not nation-states, but transnational production regimes, which extend well beyond the boundaries of nation-states.

The traditional alternative – ordo-liberal economic constitution and social democratic economic democracy – formulated by Böhm and Sinzheimer has been replaced by the opposition between the institutionally strong, tightly woven production regimes of continental Europe, organized by neo-corporatism, and the liberal finance-capital marked Anglo-American production regimes.

Against all predictions, the neo-corporatist constitutions of European economies today are undergoing a renaissance, which shows that despite globalization and economic crisis they are resilient. Moreover, the corporate codes which have emerged in the recent wave of globalization, have opened in Europe – beyond the protection of workers' rights – a new opportunity for economic democracy. Alongside the legal norms created by state intervention, the opposing power of civil society – the media, public debate, spontaneous protest, intellectuals, protest movements, NGOs, labor unions, and the professions – are exercising such a massive pressure on enterprises, that they are compelled to enact self-binding restrictions oriented on the public interest.