

Corporate Codes in the Varieties of Capitalism: How their Enforcement Depends Upon the Difference Between Production Regimes*

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Abstract:

Globalization has re-enforced the conflicts between the varieties of capitalism. The colliding units are not just nation states, but transnational production regimes. The conflicts lead global corporate codes which are developed by international organizations to develop in different directions when they are concretized on the enterprise level. They will be entirely differently enforced according to whether they are located in Liberal Market Economies (LME) adapted to the New Sovereignty of enterprises, or in Coordinated Market Economies (CME) with greater components of social welfare state and economic democracy.

Different patterns of enforcement emerge particularly when the courts have to decide whether or not corporate codes are legally binding. Multinational corporations seek by any means to keep the courts out. For them, interpretation, application and enforcement of the codes are exclusively a matter of private ordering. Thus they insist that their “voluntary” codes are legally non-binding. Accordingly, American courts are very reluctant when public interest litigation pushes them to implement the codes as legally binding rules.

The chances of enforcement appear different in continental Europe. If they are adapted into thoroughly regulated neo-corporate arrangements, then the codes will be confronted with stronger legislative activities and at the same time with stronger enforcements by the courts. In the EU the codes of conduct will have to adapt to the principles of the welfare state and economic democracy.

I. Varieties of capitalism – varieties of law

It is not by chance that a recent comparative analysis of corporate codes of conduct, which analyzes their chances of private law enforcement, chooses British and German law as its objects.² Not only the difference between common law and civil law makes this choice informative, rather, it is the difference between the economic cultures of the two countries that suggests to compare the ways how they enforce corporate codes via their national private law. Anna Beckers speaks of “two opposing poles within the Varieties of Capitalism”³ and argues that their extreme differences provide the test cases whether or not common global response for the corporate codes phenomenon are possible. In her analysis two questions are in the foreground. Is it possible (1) to realize uniform responses to a global problem in spite of fundamentally diverging approaches to the regulation of corporations and market, (2) to identify equivalent solutions for such differently organized forms of market activity and the related legal frameworks? In a fine-grained comparative analysis she

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² ANNA BECKERS, *ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW*, (2015).

³ *Id.*, at 39.

discovers commonalities in spite of differences. And when she discovers divergences, she can show that divergent national doctrines often serve as functional equivalents for solving similar problems in advanced economies.

The considerations that follow will complement these two arguments. They will analyze how socio-economic contexts, more precisely, the varieties of capitalism in the transatlantic area, influence the formulation and the enforcement of corporate codes. The 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 one of the divergent production regimes.

How do the varieties of capitalism impact on law in general? The recent trends to globalization lead, paradoxical though it sounds, not necessarily to a convergence of social orders and a unification of law. Rather, globalization itself produces new sharp differences.⁴ This leads not to greater legal unification, but rather to a stronger fragmentation of legal orders as a direct consequence of globalization. This is true for state law as well as for private ordering.

Comparative political economy confronts us with surprising empirical results, which fundamentally place the convergence thesis into question.⁵ The results are confirmed by economic history studies on the autonomy of economic cultures, which from a perspective of *longue durée* show the resiliency of collective mentalities and particularities of production cultures.⁶ Empirical inquiries and theoretical explanations of the "varieties of capitalism" school support the proposition that, against all expectations, the globalization of markets and the computerization of the economy have not led to an convergence of economic institutions and economic law. 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.⁷ 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 markets and the erection of the common market in Europe, one of the most

4 Already in the early discussion on globalization it became clear that Samuel P. Huntington, *The Clash of Civilizations*, 72 FOREIGN AFFAIRS 22 (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: Mike Featherstone & Scott Lash, *Globalization, Modernity and the Spatialization of Social Theory*, in GLOBAL MODERNITIES 1 (Mike Featherstone, et al. eds., 1995).

5 The leading reference book is VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2005). For recent analyses see: Peter A. Hall & Kathleen Thelen, *Institutional Change in Varieties of Capitalism*, 7 SOCIO-ECONOMIC REVIEW (2009). Anke Hassel, *Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe*, LEQS PAPER NO. 76/2014 (2014).

6 See generally WERNER ABELSHAUSER, THE DYNAMICS OF GERMAN INDUSTRY: GERMANY'S PATH TOWARD THE NEW ECONOMY AND THE AMERICAN CHALLENGE, (2005). Werner Abelshauer, et al., *Kulturen der Weltwirtschaft*, 24 GESCHICHTE UND GESELLSCHAFT. SONDERHEFT 9 (2012) (analyzing the historical development of various economic cultures).

7 Wendy Carlin & David Soskice, *Reforms, Macroeconomic Policy and Fiscal Stabilization Policy*, in ECONOMIC POLICY PROPOSALS FOR GERMANY AND EUROPE (Ronald Schettkat & Jochem Langkau eds., 2012). COLLIN CROUCH & WOLFGANG STREECK, MODERN CAPITALISM OR MODERN CAPITALISMS? (1995). (describing the divergence of different types of capitalism).

noteworthy results of the last forty years is that in the most varied economic institutions – in the arrangements of corporate governance, in the financial regimes of enterprises, in collective labor relations, in the education of managers, in the contractual relations between enterprises, in inter-organizational networks, in standardization processes and in inter-corporate industrial relations – institutional divergences have rather more increased than decreased.⁸

Production regimes are institutional framework conditions for economic activity.⁹ They structure the production of goods and services by way of markets and market-related institutions. The "rules of the game" of economic activities, i.e. 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 – corporate governance, 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.

The variants within capitalism do not somehow bring with them a mere re-nationalization of economic constitutions. 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. 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 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."¹⁰ 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.¹¹ Larry Backer correctly designates with these four marking

8 See generally David Soskice, *Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s*, in CONTINUITY AND CHANGE IN CONTEMPORARY CAPITALISM 271 (Herbert Kitschelt, et al. eds., 1997) (analyzing the different dimensions of production regimes).

9 See generally Hall & Soskice, *supra* note 5 (on the different production regimes as stable national or regional configurations of economy, politics, and law which are responsible for the varieties of capitalism).

10 ABELSHAUSER (2005), *supra* note 6, at 19.

11 On interlegality see generally BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION, (2003). Marc Amstutz & Vagios Karavas, *Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum*, 8 RECHTSGESCHICHTE 14 (2006).

characteristics the current global constitutional (dis)order as "fracture, fluidity, permeability, polycentricity".¹²

However, if one looks at the production regimes of Europe and the US, it appears that a counter-trend to the varieties of capitalism 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.¹³ In recent 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.¹⁴ 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.

Against these powerful trends of liberalization, it comes as a surprise that most recently democratic corporatism in continental Europe has recovered considerably. 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 2008/9, a transformation of post-war corporatism took place, which proves its resilience despite globalization and economic crisis.¹⁵ The transformation particularly took place in the power relations

12 Larry Catá Backer, *The Structure Of Global Law: Fracture, Fluidity, Permeability, And Polycentricity*, CPE WORKING PAPER NO. 2012-7; PENN STATE LAW RESEARCH PAPER NO. 15-2012. (2012).

13 ABELSHAUSER (2005), *supra* note 6, at 10 et seq.

14 WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY, 260 et seq. (2009). WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM, (2014).

15 With rich empirical material, Christian Dustmann, et al., *From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy*, 28 JOURNAL OF ECONOMIC PERSPECTIVES 167 (2014). Werner Eichhorst & J. Timo Weishaupt, *Mit Neokorporatismus durch die Krise? Die Rolle des sozialen Dialogs in Deutschland, Österreich und der Schweiz*, 59 ZEITSCHRIFT FÜR SOZIALREFORM 313 (2013).

within the corporate triangles at the macro, meso, and micro levels.¹⁶ The center of power has notably shifted to the "producer coalitions" on the enterprise level, while on the macro-level 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. For Germany, empirical investigations show that not only 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.¹⁷

Against all previsions of the collapse of neo-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.

Altogether, it seems that after a period of relative convergence toward one "neoliberal" production regime of standard capitalism, significant differences between the two production regimes have reappeared – between 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 stark 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 - in the Anglo-American area industry associations and labor unions are rather weak and play only a very limited role of

16 The 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 Gunnar Flume, *Das Modell Schweden: Kontinuität und Wandel einer Wirtschaftskultur*, in 24 KULTUREN DER WELTWIRTSCHAFT. SONDERHERT 114, 119 et seq. (2012). Frédéric Varone, et al., *The Transformations of Neo-Corporatism*, ECPR JOINT SESSIONS 114 (2015). See generally Hall & Thelen, *supra* note 5 (arguing that a more nuanced analysis within the two broad categories is needed for an understanding of recent transformations).

17 Joseph Stiglitz, "Deutschland muss mehr tun", Spiegel-Online 02. April 2009. Similar suggestions are even made in Great Britain, "Labour's Economic plans: Departmental Determinism", *The Economist*, Jan 1st 2014.

coordination in the institutional framework.¹⁸ 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 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.

Today, after the financial crisis, the differences between the two production systems have been re-enforced in the following four dimensions:¹⁹

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 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 economique* is constructed.

II. Corporate Codes in the Collisions of Transnational Production Regimes

How do the collisions between the two production regimes impact on the corporate

¹⁸ See generally Hall & Soskice, *supra* note 5 (on the differences between the two production regimes).

¹⁹ See generally Richard Deeg, *The Rise of Internal Capitalist Diversity? Changing Patterns of Finance and Corporate Governance in Europe*, 38 *ECONOMY AND SOCIETY* 552 (2009). Alice Johnston & Bob Hancké, *Wage Inflation in Labour Unions in EMU*, 16 *JOURNAL OF EUROPEAN PUBLIC POLICY* 601 (2009). Hall & Soskice, *supra* note 5 (for detailed analyses of the four dimensions).

codes of multinational enterprises? Multinational corporations had been 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. Political initiatives that aimed on 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.²⁰

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 relation between the private and public codes, an inversion has occurred of the traditional hierarchy of superior state-law and subordinate private law norms.²¹ A particularly evident reversal is found in the hard-law / soft-law quality of public and private codes. It is now the state law providing only non-binding recommendations that displays the quality of "soft law", while the private ordering of multinational corporations effectively implements precise and binding norms, and develops 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.²²

Now, the collisions between the European and the American production regime incisively change the character of corporate codes. In the vertical dimension, it is the varieties of capitalism that makes it impossible for the global institutions of the world of states – UNO, ILO, OECD, EU – to provide legally binding corporate codes for

20 See generally Larry Catá Backer, *The Concept of Constitutionalization and the Multi-Corporate Enterprise in the 21st Century*, 6 WORKING PAPERS COALITION FOR PEACE & ETHICS (2014). Gunther 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 (2012) (on the emergence of corporate codes of conduct).

21 See generally Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 87 (Günther Handl, et al. eds., 2012) (on the relationship between both types of codes).

²² For details, Teubner, *supra* note 20.

each production regime. If the major production regimes diverge as described above, then the public corporate codes cannot be formulated according to the principle of “one size fits all”. Instead, they can only be principles of soft law, while the rules of hard law can emerge only at the level of enterprises in the private codes. The public codes can no longer regulate a unitary global *ordre public économique*, but can serve only as collision rules, while the concrete rules are produced 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 to their institutional embedding in one of the two production regimes. 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 clearly in the current virulent question whether or not the state courts qualify corporate codes as legally binding and enforce them effectively under the rules of national law.²³ 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 are reluctant 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, i.e. social norms, which proscribe corporate behavior in the name of the public interest.²⁴

The chances for enforcing corporate codes via state law 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 of 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

23 See BECKERS, *supra* note 2, at 34 et seq., 320 et seq. DANIEL KLÖSEL, COMPLIANCE RICHTLINIEN: ZUM FUNKTIONSWANDEL DES ZIVILRECHTS IM GEWÄHRLEISTUNGSSTAAT, 50 et seq. (2012) (describing in detail how courts juridify corporate codes). See generally on the enforcement of transnational private regulation, M. Scheltema, *An Assessment of the Effectiveness of International Private Regulation in the Corporate Social Responsibility Arena: A Legal Perspective*, 21 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 383 (2014). P. VERBRUGGEN, ENFORCING TRANSNATIONAL PRIVATE REGULATION: A COMPARATIVE ANALYSIS OF ADVERTISING AND FOOD SAFETY, (2014). On the interplay between capital market mechanisms, state law implementation and social norms see generally Brigitte Haar, *Normanerkennung, -befolgung und Economic Behavior; Eine Studie zu Verbindlichkeitsstrukturen im Wirtschaftsrecht am Beispiel der Corporate Governance*, 100 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE, 219 (2014).

24 On these three types of norms in U.S. law, see Alexander Peukert, *Die Rechtsrelevanz der Sittlichkeit der Wirtschaft - am Beispiel der Corporate Social Responsibility im US-Recht in „CORPORATE SOCIAL RESPONSIBILITY“ (CSR) - VERBINDLICHE STANDARDS DES WETTBEWERBSRECHTS?* 233 (Reto M. Hiltl & Frauke Henning-Bodewig eds., 2014).

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.²⁵

In the European production regime, juridification by the courts, with which the legal qualification of the corporate codes enters into new found land, runs in two opposing directions. In a first constellation, the courts exert strict judicial control of the contents of the codes, in so far as the codes create compliance obligations for employees or consumers. In the second constellation, the courts move into the opposite direction, they transform the codes into binding state law, in so far as they contain self-obligations of the enterprises in the public interest.

In the first constellation, enterprises wish to keep out private compliance rules from judicial control since they want to strictly implement their internal rules. They insist on exclusive control of their rules on whistle-blowers, social political activities, internal monitoring, evaluations of performance, and internal supervision. The courts intervene nevertheless. The case of Walmart, Germany, is the most famous. Walmart had enacted strict corporate codes, governing even the private lives of the employees, and had sought to enforce a clause prohibiting love and flirtation, which is a standard clause 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 procedural principles, i.e. the participation rights of the works council, in part on substantive standards of fundamental rights.²⁶

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.²⁷ Lidl was sued, with success, for anti-competitive conduct when it made false advertisements and declared that it had fulfilled its code obligations.

In continental Europe, it is not only competition law but also tort law with its highly developed organizational duties, as well as contract law, with its comprehensive contractual and quasi-contractual obligations, and finally, the horizontal effect of fundamental rights that have the potential to transform public interest duties of the codes into binding state law. With these doctrines the European welfare-state-inspired private law has a full toolkit for the legal qualification of corporate codes at its disposal.²⁸ Thereby the courts can assure the legally binding character of the codes and enable their enforcement under national law. 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

25 The particularities under which the specific codes of conduct fall within the norm are controversial and courts have not finally clarified their scope, BECKERS, *supra* note 2, at 176 et seq.

26 Arbeitsgericht Wuppertal NZA-RR 2005, 476. Landesarbeitsgericht Düsseldorf NZA-RR 2006, 81. See KLÖSEL, *supra* note 23, at 59 et seq.

27 An extensive analysis of the Lidl case: Verbraucherzentrale Hamburg v. Lidl, Statement of Claim filed 6 April 2010, Case settled on 14 April 2010. <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/LidllawsuitreworkingconditionsinBangladesh>.

28 The current state of play and bold suggestions for further legal reforms can be seen in BECKERS, *supra* note 2, at 39 et seq., 344 et seq.

codes as serious declarations of self-commitment, but then seek to qualify them before the court as non-binding declaratory intentions: estoppel.

Another current virulent questions is whether or not corporate codes will infuse an element of politicization into the diverse economic production regimes. As for aspirations to economic democracy, the U.S. 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.²⁹ Thus, they are only enforced 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 welfare state interventions, 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.³⁰ In their adaptation to democratic corporatism, in 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, via re-embedding economic action into society. That occurs however not through external state intervention but rather in the form of a re-entry: the internalization of social demands in the decisions of the enterprise.³¹ As a consequence, the enforcement of corporate codes is not left exclusively to the national courts. Rather, judicial enforcement is accompanied and supported by societal actors who play an increasing role in the formulation and the implementation of corporate codes on the local level.

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.³² 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.³³ Civil society protests are raised increasingly not (only) against institutions of the state, but selectively, directly, and intentionally, against corporate actors, which are accused of violating their social responsibilities. Social

29 For an analysis of US-courts decisions on corporate codes see *generally* Peukert, *supra* note 24.

30 See *generally* Abelshauser (2012), *supra* note 6 (analyzing economic cultures of continental Europe in a historical perspective).

31 For details see Teubner, *supra* note 20.

32 The consequences, which result from such new institutions in international law are analyzed by Isabel Feichtner, *Verteilung in Völkerrecht und Völkerrechtswissenschaft, in VERFASSUNG UND VERTEILUNG* (Sigrid Boysen, et al. eds., forthcoming).

33 COLIN CROUCH, *THE STRANGE NON-DEATH OF NEOLIBERALISM*, Ch. 6 (2011). ROBERT O'BRIEN, et al., *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS*, 2 (2002).

movements react to drastic power shifts in the global economic constitution. It is true, 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. Thus, 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 had been only developed between enterprises and labor unions.

Their second impulse for economic democracy drastically extends the substantive issues 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 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.³⁴ While such themes had been earlier almost exclusively decided and enforced by 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 formulated and enforced through private ordering.³⁵ Of course the corporate codes cannot, like political legislation, claim universal validity. However, for the individual enterprise they have binding obligatory force, since 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 horizontal 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 duty to protect. 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.³⁶ Thus, the enforcement of human rights obligations is not only performed by national courts, rather results from a combination of public interest litigation, self-regulation of the enterprises and external monitoring by civil society actors.

³⁴ Luhmann argues that the new social movements no longer fit the form of socialist protest. They do not only refer to the consequences of industrialization and no longer have the sole goal of a better division of wealth. Their propositions have become much more heterogeneous, above all the ecological theme has crept into the foreground, NIKLAS LUHMANN THEORY OF SOCIETY, Ch. 4, XV (2012).

³⁵ For a thorough analysis, BECKERS, *supra* note 2, at 262 et seq.

³⁶ On such an extension of the third party effect of fundamental rights, see Isabell Hensel & Gunther Teubner, *Horizontal Fundamental Rights as Collision Rules: How Transnational Pharma Groups Manipulate Scientific Publications*, in CONTESTED COLLISIONS: INTERDISCIPLINARY INQUIRIES INTO NORM FRAGMENTATION IN WORLD SOCIETY (Blome Kerstin, et al. eds., forthcoming).

